

**THE FIDUCIARY DUTIES OF NONPROFIT
DIRECTORS AND OFFICERS: PARADOXES,
PROBLEMS, AND PROPOSED REFORMS**

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I. Paradoxes and Problems

A. Paradoxes

Consideration of the fiduciary duties of directors and officers of nonprofit institutions¹ necessitates grappling with a series of problematic paradoxes. Nonprofit directors and officers generally operate under the same legal standards under state law (e.g., in terms of managerial obligations and the duties of loyalty and care) as their for-profit peers, but in contrast to the for-profit world, the law plays little role (other than in aspirational terms) in assuring accountability in the nonprofit sector. Moreover, the roles of directors of nonprofit institutions are more demanding and complex than those of their for-profit peers,² but almost all evidence suggests that nonprofit directors provide less oversight, less

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¹ In general, this paper will focus on the duties of directors and officers of secular nonprofit corporations classified as public charities and established under Section 501(c)(3) of the Internal Revenue Code. Although many of the governance points made in this paper are applicable to religious corporations, private foundations, and other Section 501(c) nonprofit institutions, special factors (e.g., First Amendment protections) and legislation (e.g., with respect to private foundations) would alter the analysis in particular circumstances. See James J. Fishman & Stephen Schwarz, Cases and Materials on Non-profit Organizations 58-69 (1995) [hereinafter "Fishman & Schwarz at"].

² William G. Bowen, for example, recently observed:

In my view, it is especially hard to be an effective director of a nonprofit organization. The very mission of the en-

effective participation in decisionmaking, and in general, less effective governance than their peers in comparable for-profit corporations. Perhaps the central paradox of nonprofit corporate governance, particularly for friends and admirers of the nonprofit sector like me, is the fact that the nation's nonprofit institutions are the recipients of so much public and private largess (in terms of gifts, grants, tax benefits, volunteer efforts, and other subsidies) and yet are subjected to so few accountability constraints.

There would be no reason for concern about these paradoxes -- and the relative absence of accountability constraints -- if one could assume that a personal sense of responsibility, pride, decency, peer pressures, and similar factors were making the nonprofit governance system work effectively. But there is much evidence -- although it is largely anecdotal -- to the contrary. A recent piece in the Harvard Business Review began: "Effective governance by the board of a nonprofit organization is a rare and unnatural act."³ Simi-

terprise can be difficult to define with precision and subject to intense debate. It is often seen differently by various influential participants and supporters. Relevant data and analyses are frequently either unavailable or, if available, tricky to interpret. Performance often defies easy assessment and lackluster leadership can go unnoticed, or at least uncorrected, for considerable periods of time. Resources are almost always scarce, and problems often appear intractable. Creative solutions can be elusive and, if identified, hard to put into effect-- in part because of the lack of ready access to the kind of "buy-sell" mechanisms provided by markets.

William G. Bowen, Inside the Boardroom: A Reprise, in Victor Futter & George W. Overton (ed.), Nonprofit Governance 9 (1997); see discussion pages 14-15 infra.

³ Barbara E. Taylor, Richard P. Chait & Thomas P. Holland, The New Work of the Nonprofit Board, Harv. Bus. Rev. 36 (Sept.-Oct. 1996). Daniel L. Kurtz, a former

larly, Professor James J. Fishman concluded:

Because nonprofits tend to have many directors who are on the board for "window dressing" only, a common phenomenon of nonprofit boards is directors who do not direct. The "figurehead" directors assume non-involved roles on the board, rarely attending meetings, and certainly never involving themselves in oversight responsibilities. They are corrosive to nonprofit corporations in that they allow employees or fellow directors to dominate the organization.⁴

Although serious empirical evidence is not available, it seems entirely likely that ineffective nonprofit corporate governance has had a significantly negative impact on the capacity of nonprofit corporations to carry out their missions.⁵

Of even greater concern are recent well-publicized scandals in the duty of loy-

head of the New York Attorney General's Charities Bureau, reported: "Probing questions by charity board members have been viewed as simply bad manners." Fishman & Schwarz at 186.

⁴ James J. Fishman, Standards of Conduct for Directors of Nonprofit Corporations, 7 Pace L. Rev. 389, 397 (1987); see, e.g., Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses and Missionaries, 367 F. Supp. 536 (D.D.C. 1973).

⁵ See discussion pages 3-9 infra; cf. Ira M. Millstein & Paul W. MacAvoy, The Active Board of Directors and Improved Performance of the Large Publicly-Traded Corporation, Working Paper 49, Yale School of Management (1997) [hereinafter "Millstein & MacAvoy at"] (concluding that for-profit corporations "with active and independent boards appear to have performed much better in the 1990s than those with passive boards").

alty area.⁶ Improper self-dealing and other duty of loyalty violations threaten to undermine the trust and goodwill necessary for the nonprofit sector to function successfully. The following review of three recent serious governance failures, by different types of nonprofit corporations, is intended to illustrate the cost to the nonprofit community of the present absence of accountability constraints.

B. Problems: United Way, Adelphi, and Nonprofit Conversion Transactions Illustrate Reasons for Concern

In December 1991, officers of the United Way of America ("UWA") learned that two reporters from The Washington Post were investigating allegations that then-UWA President William Aramony was misusing funds and resources. According to the Executive Summary of a report later prepared for the Board of Governors of UWA⁷:

Generally, it was alleged that Mr. Aramony maintained a lifestyle exceeding the level of comfort and convenience which most people would accept from the leader of a charitable organization. Specifically, it was alleged that Mr. Aramony used UWA funds, both directly and through the use of organizations which had been spun off from

⁶ See, e.g., Fishman & Schwarz, 1997 Supplement at 9-17 (dealing with the Adelphi case); Gilbert M. Gaul & Neill A. Borowski, Free Ride: The Tax-Exempt Economy (1993); Deborah A. DeMott, Self-Dealing Transactions in Nonprofit Corporations, 59 Brook. L. Rev. 131 (1993) [hereinafter "DeMott at"]; Developments in the Law--Nonprofit Corporations, 105 Harv. L. Rev. 1590, 1591 n.5 (1992).

⁷ The Report to the Board of Governors of United Way of America [hereinafter "The Report at"] was submitted by the law firm of Verner, Liipfert, Bernhard, McPherson and Hand on April 2, 1992. Most of The Report was published in the December 1991 and the January - February 1992 issues of The Philanthropy Monthly.

UWA operations, to rent limousines, to take transatlantic flights on the Concorde, and to reward friends and family members with jobs, board memberships, and consulting contracts.⁸

Aramony, who had been “chief staff officer”⁹ or president of UWA from 1970 until his resignation in February 1992, was ultimately indicted, convicted,¹⁰ and most of his conviction was affirmed on appeal.¹¹ His conduct was reprehensible, but from a corporate governance perspective -- or a public policy perspective -- the most significant question is: Where was the Board?

During Aramony’s tenure, UWA’s Board had more than 30 members. Although the Board had representatives from labor and the nonprofit sector, it was comprised “almost exclusively of individuals holding (or having held) prestigious positions at some of America’s largest corporations.”¹²

The Report indicates the following about the passivity of UWA's Board: (i) the Board met twice each year and an Executive Committee of the Board also met twice each year¹³, and both received little material information; (ii) although the Board received in-

⁸ Executive Summary of The Report at 1.

⁹ The Report at 10.

¹⁰ See Karen W. Arenson, Former United Way Chief Guilty in Theft of More Than \$600,000, N.Y. Times, Apr. 4, 1995, at A1.

¹¹ See United States v. Aramony, 88 F.3d 1369 (4th Cir. 1996).

¹² The Report at 50.

¹³ Id. at 50.

adequate information and facially flawed rationales with respect to the creation of spin-off corporations, "Aramony's requests for spinning off UWA functions into separate corporations were always granted by the Board or the Executive Committee";¹⁴ (iii) "[o]nce the spin-offs were separately incorporated, the UWA Board, in spite of apparent interlocking relationships, lost control and supervision over the conduct of the spin-offs. As a result, the spin-offs were able to provide compensation perquisites to certain individuals from multiple sources and to engage in certain questionable business transactions which might not have been authorized if the matters had been subjected to UWA Board scrutiny";¹⁵ (iv) the "numerous abuses of the UWA financial system involving avoidance of financial control procedures, use of restricted funds for other than the stipulated restricted purposes, payment of questionable fees, financial transactions with the spin-offs, and related matters were not brought to light by the annual audits."¹⁶ This apparently occurred, at least in part, because the Board did not know that Aramony had sharply limited the scope of UWA's audits; and (v) the Board had no compensation committee, there is "little indication" that it "received comprehensive or accurate briefings on proposals regarding benefit policies,"¹⁷ and it played almost no role in evaluating officers or setting their salaries.¹⁸

¹⁴ Id. at 12.

¹⁵ Id. at 13.

¹⁶ Id. at 40.

¹⁷ Id. at 44.

¹⁸ "Officer salaries would be unilaterally set by Mr. Aramony after the Board approved a total amount of officers' salaries." The Report at 41.

It is hardly conceivable that in the early 1990's the senior corporate executives who comprised the bulk of the UWA Board would have permitted their for-profit boards to operate in this fashion.¹⁹ Moreover, the failure to effectively oversee the operation of UWA cannot be rationalized on the basis of the corporation's economic insignificance. In the early 1990's, UWA was a national membership organization with approximately 1,400 United Way local members, had a budget of roughly \$30 million, and in "1990, under what has come to be known as the United Way system, \$3.11 billion in charitable funds were raised to fund an estimated 44,000 agencies nationwide."²⁰ On December 28, 1995, the Attorney General of the State of New York signed a settlement with UWA that sanc-

¹⁹ See, e.g., Millstein & MacAvoy at 1-13; Harvey J. Goldschmid, Harmonization of Corporate Law in Federal Systems: A United States Perspective, in Ingolf Pernice (ed), Harmonization of Legislation in Federal Systems 161 (1996) [hereinafter "Goldschmid at"]. E. Norman Veasey, the Chief Justice of Delaware, recently concluded an address as follows:

The law of fiduciary duty is not static. It is dynamic. Courts may take into account modern trends and adjust jurisprudence accordingly--whether it be:

- Expecting modern compliance programs
- Expecting an active--not passive board
- Respecting independence and hard work of nonmanagement directors....

E. Norman Veasey, The Director and the Dynamic Corporation Law With Special Emphasis on Oversight and Disclosure, Address at the 17th Annual Ray Garrett Jr. Corporate and Securities Law Institute (Apr. 24, 1997) [hereinafter "Veasey at"].

²⁰ The Report at 7.

tioned no individual but mandated various corporate governance reforms.²¹

Adelphi University's president, Peter Diamandopoulos, shared common ground with UWA's Aramony in being a dominant full-time executive. He was appointed in 1985. In subsequent years, according to Professors Fishman and Schwarz:

Diamandopoulos lost the support of all campus constituencies except the trustees, most of whom he appointed. A decisive moment in Diamandopoulos's administration came in the fall of 1995, when a report in the Chronicle of Higher Education revealed that he was the nation's second highest paid college president. A Committee to Save Adelphi was formed and brought allegations to the New York Board of Regents, accusing the governing board and president of misappropriation of funds, conflicts of interest, and lavish expenditures by the president.²²

Both Aramony and Diamandopoulos were an executive type well known in the for-profit sector. Dean Courtney Brown, of Columbia's Graduate School of Business, who

²¹ Assurance of Discontinuance Pursuant to Executive Law Section 63(15), In the Matter of the Investigation by Dennis C. Vacco, Attorney General of the State of New York, of United Way of America, Inc. (December 28, 1995) [hereinafter "UWA Settlement at"]. Most of the stipulated reforms (e.g., with respect to additional board meetings, oversight committees, and information dissemination), which covered about 14 pages, had already been put in place by UWA's new management and Board.

²² Fishman & Schwarz, 1997 Supplement at 9; see William H. Honan, Campus in Turmoil: A Special Report; Adelphi, a Little University with Big Ideas, N.Y. Times, Feb. 5, 1997, at B1.

spent over two decades serving on some of the nation's most important for-profit boards, concluded:

[A] single major blunder of judgement can damage an enterprise seriously. It would be interesting to know the extent to which write-offs ranging from \$100 million to \$500 million that have been recorded in recent years ...stemmed from the dominant influence of one decision maker.²³

Victor H. Palmieri, who had a flourishing career turning floundering for-profit corporations around (beginning with Penn Central), has described a "failed-company syndrome" that involves a "corporate despot," who "brooks no argument either by his forceful personality or by just being an S.O.B., or some combination of those. . . ." Palmieri stressed the need for independent oversight of full-time managers.²⁴

By the 1990's, in the for-profit sector, a combination of factors had made corporate boards more active, and had mitigated the dangers presented by the "corporate despot."²⁵ In a recent piece, in an analogous area, I pointed to (and then analyzed) the follow "mitigating circumstances":

1. The federal securities laws have filled some of the gap created by permissive state laws....

²³ D. Courtney Brown, Putting the Corporate Board to Work 16 (1976).

²⁴ Victor H. Palmieri, Shooting Stars and Corporate Flameouts, Address at the Annual Meeting of the American College of Investment Counsel (Sept. 1983).

²⁵ See supra note 19.

2. Effective global competition has also helped fill some of the gap....
3. New decisions by Delaware courts have alleviated some of the problem....
4. Among the other factors... that have mitigated potential harm caused by permissive state law during recent years are the following: (i) greater interest in corporate governance and increased activity by institutional investors; (ii) corporate governance rules promulgated (often with SEC prodding) by important quasi-private institutions like the New York Stock Exchange (e.g., requiring independent audit committees for listed corporations); (iii) peer pressures among outside directors -- often stimulated by more acute financial press coverage in recent years -- leading to more effective governance and more experimentation with governance innovations (e.g., separate meetings of outside directors); and (iv) hostile takeover attempts (which have been a mixed blessing).²⁶

It should be carefully noted that few of these for-profit “mitigating circumstances” would apply to a “corporate despot” now operating in the nonprofit sector.

In terms of patterns, what distinguishes the Adelphi and UWA situations, in ad-

²⁶ Goldschmid at 167-68.

dition to the absence of criminality in the former, is that the outside directors of UWA may have neglected their duties, but they acted in good faith and without disabling conflicts of interest. In the Adelphi case, the New York Board of Regents²⁷ found several instances of improper self-dealing by outside directors, and in February 1997, removed 18 of the 19 trustees for failures with respect to both their duties of care and loyalty.²⁸

Finally, the National Center's conference last year dealt with the legal and public policy issues raised by health care conversions (e.g., acquisitions of nonprofit corporations by for-profit corporations.)²⁹ My paper focused on the absence of accountability constraints -- which resulted in scandalously inadequate prices and other loyalty abuses -- and commented as follows:

Nonprofit conversions suffer when compared to for-profit acquisitions because of the nature of nonprofit directorships, the nonexistence or inadequacy of disclosure requirements, the limits on standing to sue and other legal safeguards, and the general difficulty of valuation in the nonprofit conversion context. In making acquisitions, for-profit corporations

²⁷ The Board of Regents is an independent body, appointed by New York's legislature, which has the "power to remove [educational] trustees for neglect of duty, an action which has been exercised only four times in 80 years." Fishman & Schwarz, 1997 Supplement at 9.

²⁸ See Fishman & Schwarz, 1997 Supplement at 9-17.

²⁹ See the National Center on Philanthropy and the Law, Conversion Transactions: Changing Between Nonprofit and For-Profit Form (1996) [hereinafter "Conversion Transactions at "].

like Columbia/HCA Healthcare Corp. have been negotiating with nonprofit directors who: (i) may have little or no acquisition experience and, unlike many for-profit directors, were selected for reasons wholly unrelated to their ability to obtain fair value from a purchaser; (ii) usually have limited time to devote to their institutions and are unpaid; (iii) sometimes have serious conflicts of interest; and (iv) usually are hesitant to spend nonprofit dollars on investment bankers, accountants, lawyers, and others associated with for-profit acquisitions. Even more important, in an acquisition of any size in the for-profit sector, extensive disclosure to the SEC, and, in effect, to the public is required. Except for a relatively few instances (e.g., special legislation in California and effective use of leverage of the type described by Messrs. Boisture and Varley), no disclosure is required in the acquisition of a nonprofit corporation. Even where disclosure is mandated, it appears to involve the production of documents to understaffed state charity regulators, and not the detailed disclosures in accordance with carefully conceived disclosure schedules -- subject to a spectrum of effective remedies -- required under our federal securities laws.

Moreover, no protection analogous to the shareholder

vote of approval, required in a for-profit acquisition, is available in the nonprofit context. In general, the absence of private rights of action and of class and derivative actions (when compared to the for-profit sector) seriously undermine the effectiveness of fiduciary doctrines.³⁰

Today, given the well-publicized travails of Columbia/HCA and new legislation in several states,³¹ nonprofit hospitals are less vulnerable to unfair conversion offers. But the basic governance problems in the conversion transaction area -- for hospitals, for other health care institutions, and in general, for nonprofit corporations -- remain.

The fundamental question posed by these three illustrations -- and the many others that could be cited involving similar patterns³² -- is: What legal reforms, if any, would make the situation better? The "if any" qualification is stated seriously. Harsh new fiduciary requirements -- or uncontrolled exposure to litigation -- for nonprofit directors and officers would almost certainly have counterproductive effects. As is true of for-profit directors and officers, professionals, and almost all others in our society, the accountability of nonprofit directors and officers -- and the effective functioning of their institutions -- is,

³⁰ Harvey J. Goldschmid, Nonprofit Conversion Transactions: Existing Fiduciary Duties and Necessary Reforms, in Conversion Transactions at C1-3.

³¹ See James F. Owens, States Regulate Non-Profit Hospital Conversions, Nat'l. L.J., Sept. 8, 1997, at B 10.

³² See, e.g., supra note 6; David G. Samuels, Obligations of Fiduciaries of Charitable Foundations, N.Y.L.J., Feb. 5, 1997, at 1; Roy M. Adams, Stephanie H. Denby & Jacqueline C. Zipser, A Nonprofit Director's Roadmap for Survival, 135 Trust & Estates 42 (1996).

of course, a legitimate public policy concern. But there must be concomitant concern about the need to encourage individuals with vision, ability, resources, and expertise to serve the nonprofit sector. Fairness to those who are willing to serve as nonprofit directors and officers is clearly an essential value.

For the most part,³³ the governance standards of nonprofit corporations are controlled by state law. Professor DeMott recently described nonprofit corporations as “corporate ‘Cinderellas,’ as the ‘neglected stepchildren of modern organization laws,’ relegated to the hand-me-downs of their half-siblings, for-profit business organizations.”³⁴ My view is that the for-profit “hand-me-downs” fit -- and look -- pretty well in the nonprofit context. Only a few significant doctrinal modifications in the sensitive transaction (e.g., conversion transactions) and loyalty areas, and cautions experimentation with less restrictive standing rules are needed to get Cinderella, sparkling and properly dressed, ready for the ball. These reforms, as well as the need for enhanced educational efforts and enhanced governmental monitoring and enforcement capacities, are discussed in Section III infra.

³³ With respect to the role of federal law, as reflected in Internal Revenue Code provisions, in nonprofit corporate governance, see supra note 84.

³⁴ Deborah A. DeMott, Shareholder Derivative Actions §2:04, at 22 (1994 and Supp. 1997).

II. Current Managerial, Care, and Loyalty Standards

Although there are dissenters for one reason or another,³⁵ Professor DeMott correctly recognizes that, in general, as the Guidebook for Directors of Nonprofit Corporations explains:

The Duties of Care and Loyalty are the common terms for the standards which guide all actions a director [or officer] takes. These standards are derived from a century of litigation principally involving business corporations and are equally applicable to nonprofit corporations.³⁶

In general, in discussing managerial standards and the duties of care and loyalty in the for-profit context, I will cite heavily and rely on the American Law Institute's Principles of Corporate Governance ("ALI Principles"), which were adopted in 1992.³⁷ As they are cited and quoted herein, except where expressly indicated otherwise, the ALI

³⁵ Some have argued that directors and officers of nonprofit corporations do or should have higher fiduciary responsibilities (usually in the loyalty area) than their for-profit peers. See, e.g., DeMott at 137-38; Henry B. Hansmann, Reforming Nonprofit Corporation Law, 129 U. Pa. L. Rev. 497, 567-72 (1981) (an "attractive alternative to the current prevailing doctrine would be a flat prohibition against all self-dealing transactions"). Other commentators have argued for lower standards (usually in the care area) for nonprofit fiduciaries. See, e.g., David W. Barrett, A Call for More Lenient Director Liability Standards for Small, Charitable Nonprofit Corporations, 71 Ind. L. J. 967 (1996).

³⁶ Section of Business Law, American Bar Association (George W. Overton ed.), Guidebook for Directors of Nonprofit Corporations 21 (1993) [hereinafter "Nonprofit Guidebook at"].

³⁷ See 1-2 American Law Institute, Principles of Corporate Governance: Analysis and Recommendations (1994) [hereinafter "ALI Principles at"].

Principles are consistent with the law in almost all jurisdictions, and in my view, would almost certainly be as applicable to directors and officers of nonprofit corporations as they are to directors and officers of for-profit corporations.³⁸

A. Current Managerial Standards: A Potential Trap for the Unwary

New York's Not-for-Profit Corporation Law ("N-PCL") majestically commands that "a corporation shall be managed by its board of directors."³⁹ Section 8.01 of the Revised Model Nonprofit Corporation Act states that "all corporate powers shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, its board." Both of these formulations parrot traditional language in the statutes governing for-profit corporations. What is unclear, however, is what nonprofit boards are actually supposed to do.

The generality of the statutory provisions may create false comfort in many nonprofit directors who assume that a little governance activity and a lot of fund-raising will suffice. The generality also may raise unrealistic expectations in state charity regulators or judges, who may take the word "managed" literally. The ALI Principles, analyzed these same statutory commands in a for-profit context, and concluded with respect to officers:

The management of the business of a publicly held cor-

³⁸ I was the Reporter for Part IV of the ALI Principles dealing with "Duty of Care and the Business Judgment Rule." In general, the quotations from the ALI Principles will not indicate the deletion of bracketed material citing to definitions.

³⁹ N-PCL §701.

poration should be conducted by or under the supervision of such principal senior executives as are designated by the board of directors, and by those other officers and employees to whom the management function is delegated by the board or those executives⁴⁰

Section 3.02 of the ALI Principles then narrows the literal command of the statutory provisions for directors and specifically provides:

The board of directors of a publicly held corporation should perform the following functions:

- (1) Select, regularly evaluate, fix the compensation of, and, where appropriate, replace the principal senior executives;
- (2) Oversee the conduct of the corporation's business to evaluate whether the business is being properly managed;
- (3) Review and, where appropriate, approve the corporation's financial objectives and major corporate plans and actions;

⁴⁰ 1 ALI Principles (§3.01) at 82; see Nonprofit Guidebook at 24 (“Even under statutes providing that the business and affairs of a corporation shall be ‘managed’ by the board of directors, it is recognized that actual operation is a function of ‘management,’ that is, the officers and agents of the corporation”).

(4) Review and, where appropriate, approve major changes in, and determinations of other major questions of choice respecting, the appropriate auditing and accounting principles and practices to be used in the preparation of the corporation's financial statements;

(5) Perform such other functions as are prescribed by law, or assigned to the board under a standard of the corporation.⁴¹

How many boards of large nonprofit corporations today function in a way that would meet these standards? Note that the ALI's formulation could be marginally modified (e.g., to take specific account of a nonprofit's mission), but in general, the ALI's approach preserves flexibility; more important, it encourages activity -- far more activity than we generally see now in nonprofit boardrooms -- and it encourages accountability. A board could take on other tasks, but what is stipulated in §3.02, as it would be modified for nonprofit corporations, would be all that is legally required. Similar formulations were recently proposed for nonprofit boards by Williams G. Bowen and for for-profit boards by The Business Roundtable and National Association of Corporate Directors.⁴²

It is generally recognized that a failure to carry out the functions specified in

⁴¹ 1 ALI Principles at 86.

⁴² See William G. Bowen, Inside the Boardroom: Governance by Directors and Trustees 18-20 (1994); The Business Roundtable, Statement on Corporate Governance (Sept. 1997); National Ass'n of Corporate Directors, Blue Ribbon Comm'n Report on Director Professionalism (1996).

§3.02 of the ALI Principles (and similar formulations for nonprofits) would make directors -- of nonprofit or for-profit corporations -- vulnerable under duty of care standards. As indicated in Section III infra, what appears to be a general lack of information in the nonprofit community with respect to a board's obligations suggests strongly the need for enhanced educational efforts.

I am anxious to see increased governance activity and accountability by nonprofit boards, but I worry about the trap for the unwary aspects of our current situation. I suspect that only our highly restrictive standing rules -- which I would modify -- and the forbearance and egregious understaffing of our state charity regulators stand between nonprofit directors of large institutions and an unfortunate morass of expensive and embarrassing litigation.⁴³

⁴³ The UWA settlement with New York's Attorney General included the following provisions:

The duties of the Board to manage and oversee the affairs of UWA shall include:

- a. establishing and overseeing the implementation of the organization's major policies and procedures;
- b. overseeing the management of UWA's finances, including reviewing and approving yearly budgets, periodically reviewing financial projections, and establishing and implementing fiscal controls sufficient to assure that UWA's resources are expended only for its corporate purposes;
- c. defining, modifying or clarifying UWA's mission, after any necessary consultation with UWA's members;
- d. taking all steps necessary to ensure that UWA is being managed consistent with its mission and that its assets are

B. Duty of Care and the Business Judgment Rule

Section 717 of New York's N-PCL states:

Directors and officers shall discharge the duties of their respective positions in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions.

Section 8.30 of the Revised Model Nonprofit Corporation Act contains a similar formulation with what appears to be the same substantive content. Again, these formulations parrot for-profit statutes.⁴⁴

being expended prudently and only for its corporate purposes;

e. setting compensation for, defining duties of, and monitoring and evaluating the performance of the chief executive officer and senior executive staff;

f. having UWA's Audit Committee receive and review reports on the activities of legal counsel and outside accountants;

g. establishing procedures to ensure that each director conscientiously performs his or her duties;

h. monitoring of Board directives to staff, committees, paid professionals and/or officers to ensure implementation;

i. holding UWA's General Counsel and other staff accountable for ensuring corporate compliance with federal and state laws and UWA's corporate by-laws.

UWA Settlement at 6-7.

⁴⁴ See 1 ALI Principles at 144-61.

Daniel L. Kurtz has accurately described the distinction between the duty of care and the duty of loyalty in the following terms:

The duty of care concerns the director's competence in performing directorial functions and typically requires him to use the care that an ordinarily prudent person would exercise in a like position and under similar circumstances. The duty of loyalty requires the director's faithful pursuit of the interests of the organization he serves rather than the financial or other interests of the director or of another person or organization. And the duty of obedience requires that a director act with fidelity, within the bounds of the law generally, to the organization's "mission," as expressed in its charter and by-laws.⁴⁵

Although Kurtz's treatment of a "duty of obedience," as separate from the duty of care, is analytically justifiable, my analytical approach -- consistent with for-profit case-law -- is to treat obedience to the "bounds of the law" and "mission" as special functions of directors and officers to which general duty of care standards are applicable.⁴⁶ It should be recognized, however, that the obligation of nonprofit directors and officers with respect to the corporation's mission creates a more difficult and complex decisionmaking

⁴⁵ Daniel L. Kurtz, Board Liability: A Guide for Nonprofit Directors 21 (1988) [hereinafter "Kurtz at"].

⁴⁶ See 1 ALI Principles at 134-88.

process for them than for their for-profit peers. For-profit directors and officers are principally concerned about long-term profit maximization,⁴⁷ while nonprofit directors and officers, while keeping economic matters in mind, are principally concerned about the effective performance of the nonprofits's mission. It would be entirely appropriate, for example, for the directors of a nonprofit hospital, in accord with their duty of care and business judgment responsibilities, to accept a "low bid" from one of several suitors because the chosen bidder would provide a far higher level of public benefit or service to the community. In most instances, a for-profit board would have -- and should have -- no such freedom.

Duty of care standards in the for-profit sector have received extensive judicial and commentator attention during the past two decades, and these sources should provide substantial guidance to the nonprofit community.⁴⁸ Briefly summarized, the ordinarily prudent person language in statutory provisions and common-law cases is intended to convey the image of a generalist who has the capacity to perform the functions discussed in Section II A supra. In general, to perform the functions of a director or officer no special expertise in any field is required. "There are instances, however, when special skills or expertise may be a prerequisite for appointment to a particular corporate office (e.g., controller or general counsel). In those instances, the officer undertaking the position will

⁴⁷ See 1 ALI Principles (§2.01) at 55-70.

⁴⁸ See, e.g., Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 274-75 (2d Cir. 1986); Francis v. United Jersey Bank, 87 N.J. 15, 432 A.2d 814 (1981); 1 ALI Principles at 134-88.

be held to the duty of care of an ordinarily prudent person in such a position.”⁴⁹

The terms “similar circumstances” and “like position” provide flexibility by permitting factors like the nature of the nonprofit, its size and complexity, the magnitude of any problems, and the individual role of a director or officer to be taken into account in judging whether the director or officer has acted with reasonable care.⁵⁰ It is now well settled that duty of care standards require “reasonable inquiry” in appropriate circumstances.⁵¹

For the guidance of the nonprofit community, three basic duty of care issues must now be addressed. The first deals with the sense that current duty of care standards, in the words of Professors Fishman and Schwarz, are “quite low.”⁵² The second relates to the “affirmative obligation of directors to be reasonably concerned with the existence and effectiveness of procedures, programs, and other techniques... to assist the board in overseeing the corporation’s business.”⁵³ The third addresses the role of the business judgment rule.

1. The myth of “quite low” standards. The “reasonable care” articulations of duty of care standards are certainly not “quite low” in literal terms. Moreover, during the

⁴⁹ 1 ALI Principles at 148.

⁵⁰ See 1 ALI Principles at 151-52.

⁵¹ See, e.g., 1 ALI Principles 161-64; Revised Model Nonprofit Corporation Act: Official Text With Official Comments 214 (1988) (“In appropriate circumstances the duty of care requires reasonable inquiry”).

⁵² Fishman & Schwarz at 186.

past two decades in the for-profit sector, state courts have been applying duty of care standards in a demanding way. The Supreme Court of New Jersey, for example, imposed a standard of “ordinary care” on directors and indicated that “dummy, figurehead and accommodation directors are anachronism with no place in New Jersey law.” It required that directors “exercises reasonable supervision and control over the policies and practices of a corporation. The institutional integrity of a corporation depends upon the proper discharge by directors of those duties.”⁵⁴ Delaware uses a “gross negligence” standard (which is inconsistent with the articulations in most states), rather than a “reasonable care” formulation,⁵⁵ but its Supreme Court has applied this standard with considerable rigor during the past decade.⁵⁶ Chief Justice Veasey recently described active “independent directors” as necessary “to make the system work.”⁵⁷

In both the for-profit and nonprofit sectors, duty of care standards should not be applied harshly or unrealistically. The application of these standards should involve subtle and fair-minded evaluations of specific facts and circumstances. “Directors and officers obviously should not be required to insure that every potential corporate problem is anticipated or that every instance of wrongdoing (e.g., looting by an employee) is pre-

⁵³ 1 ALI Principles at 165.

⁵⁴ Francis v. Untied Jersey Bank, 87 N.J. 15, 31-36, 432 A. 2d 814, 822-24 (1981).

⁵⁵ See ALI Principles 153-58.

⁵⁶ See, e.g., Cede v. Technicolor, Inc., 634 A.2d 345 (Del. 1993); Smith v. Van Gorkman, 488 A.2d 858 (Del. 1985).

⁵⁷ E. Norman Veasey, The Defining Tension in Corporate Governance in America,

vented.”⁵⁸ But it is critical to note that it is not the “lowness” of care standards but rather the absence of enforcement (because of forbearance, understaffing, and highly restricted standing) that makes care standards largely aspirational in the nonprofit context. Indeed, if enforcement opportunities are enhanced, nonprofit law may have to build in some of the mitigating provisions found in the for-profit sector.⁵⁹

2. Programs, procedures, and other techniques to assist the board. The complexity and scale of many modern nonprofit corporations compels directors and officers to rely heavily on other directors and officers, employees, professionals, and other persons. Such reasonable reliance is entirely appropriate.⁶⁰ But given this complexity and scale, increasing emphasis is being placed on what the ALI Principles concluded was the board’s “affirmative obligation” to be “reasonably concerned with the existence and effectiveness of procedures, programs, and techniques ... to assist the board in overseeing the corporation’s business.”⁶¹ Chancellor Allen of Delaware recently indicated that a director’s duty of care obligations includes “a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists.”⁶² Chief

52 Bus. Law. 393 (1997); see Veasey at 17.

⁵⁸ 1 ALI Principles at 134.

⁵⁹ See, e.g., 2 ALI Principles at 238-60.

⁶⁰ See 1 ALI Principles (§§4.02-.03) at 188-204.

⁶¹ 1 ALI Principles at 165.

⁶² In Re Caremark International Inc. Derivative Litigation, 1996 WL 549894 (Del. Ch. 1996).

Justice Veasey of Delaware recently opined that “the oversight responsibility is a dynamic one” and that today information and compliance programs are expected.⁶³

The message for nonprofit directors and officers is obvious. Although information and compliance programs must be tailored to the needs of individual institutions, a “reasonable concern” about those needs is now legally required.

3. The role of the business judgment rule. The business judgment rule is a judicial gloss on duty of care standards that sharply reduces exposure to liability for erroneous judgments. Although formulations of the business judgment rule vary, basically the rule requires that decisions be made: (i) in good faith and without a conflict of interest; (ii) on a reasonably informed basis; and (iii) with a "rational belief" (words connoting broad discretion and wide latitude) that the business judgment is in the best interests of the corporation.⁶⁴

The rationale for the business judgment rule -- e.g., it encourages rational risk taking and innovation, limits litigation and unfair exposure, encourages service by quality directors, and limits judicial intrusiveness -- applies as much to nonprofit directors and officers as to their for-profit peers. There is wisdom in protecting nonprofit directors from hindsight reviews of their unsuccessful decisions and encouraging them to change the configuration of their nonprofit enterprises (e.g., expand a nonprofit museum, produce a new educational or health care product, and accept or reject a conversion proposal). It is

⁶³ Veasey at 11, 17.

⁶⁴ See ALI Principles at 172-88; cf. Kurtz at 49.

sound public policy to accept the risk that informed decisions by nonprofit directors -- honestly undertaken (without conflict of interest) and rationally believed to be in the best interests of the nonprofit -- may not be vindicated by subsequent success.

Although there is relatively little caselaw, a number of courts have applied the business judgment rule to the decisions of nonprofit directors.⁶⁵ The Appellate Division in New York, in the Scheuer Family Foundation case, assumed the applicability of the business judgment rule, but, because conflicts of interest were involved, found it unnecessary to resolve the issue.⁶⁶ The Official Comment to Section 8.30 of the Revised Model Nonprofit Corporation Act states that while "the application of the business judgment rule to directors of nonprofit corporations is not firmly established by the case law, its use is

⁶⁵ See, e.g., Beard v. Achenbach Memorial Hosp. Ass'n., 170 F.2d 859 (10th Cir. 1948); Yarnall Warehouse & Transfer, Inc. v. Three Ivory Bros. Moving Co., 226 So. 2d 887 (Fla. Dist. Ct. App. 1969); John v. John, 450 N.W. 2d 795 (Wis. Ct. App. 1989).

⁶⁶ See Scheuer Family Foundation Inc. v. 61 Associates, 179 A.D. 2d 65 (1st Dept. 1992); cf. Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y. 2d 530 (1990). In the Adelphi case, New York's Board of Regents concluded:

In setting the compensation of their officers, not-for-profit trustees also have the benefit of the "business judgment rule," which bars a substantive review of the merits of their decisions, as long as they have acted in good faith, with due care and in the absence of self-dealing. Where these circumstances exist, trustees are not liable for mere errors in judgment and cannot be second-guessed through application of hindsight. Although the trustees have not cited any case law in which a New York court has specifically applied the business judgment rule to trustees of education corporations, presumptively the rule would apply to an education corporation just as to any other not-for-profit corporation.

Fishman & Schwarz, 1997 Supplement at 32.

consistent with section 8.30."⁶⁷

The assumption is erroneous, however, that the business judgment rule provides directors with an overly protective “free ride” from liability. For the business judgment rule to shield nonprofit directors from liability, the following must occur:

a. Prerequisite of a conscious exercise of judgment. To be protected under the business judgment rule a decision must be consciously made and judgment must, in fact, have been exercised. As the ALI Principles put it: There is, however, no reason to provide special protection where no business decisionmaking is to be found. If, for example, ... a director received but did not read basic financial information ... and thus allowed his corporation to be looted [business judgment protection would be manifestly undesirable].⁶⁸

b. Prerequisites of good faith and no interest. It is well settled that good faith and disinterested decisionmaking are prerequisites to entry into the business judgment rule’s safe harbor.⁶⁹ If, for example, a conversion transaction involves a leveraged buyout by the nonprofit’s directors and officers, the demanding standards of duty of loyalty case-law (discussed infra), not the business judgment rule, would be applicable.

c. Prerequisite of an informed decision. The ALI Principles explain:

Among the factors that may have to be taken into account
in judging a director’s reasonable belief as to what was “ap-

⁶⁷ Revised Model Nonprofit Corporation Act: Official Text With Official Comments 216 (1988); see Nonprofit Guidebook at 27.

⁶⁸ Id. at 174-76.

⁶⁹ Id. at 176-77.

appropriate under the circumstances” are: (i) the importance of the business judgment to be made; (ii) the time available for obtaining information; (iii) the costs related to obtaining information; (iv) the director’s confidence in those who explored a matter and those making presentations; and (v) the state of the corporation’s business at the time and the nature of competing demands for the board’s attention.⁷⁰

Basic to an understanding of the “reasonably informed” component of the business judgment rule is recognition that it requires “reasonable inquiry” in appropriate circumstances.⁷¹

Finally, it should be carefully noted that the most important recent case dealing

⁷⁰ Id. at 178.

⁷¹ Id. at 161-64, 179. See, e.g., Hoyer v. Meek, 795 F.2d 893, 896 (10th Cir. 1986); Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 275 (2d Cir. 1986); Barnes v. Andrews, 298 Fed. 614, 615-16 (S.D.N.Y. 1924); Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) (“the directors were duty bound to make reasonable inquiry”); Devlin v. Moore, 64 Or. 433, 443, 130 P.35, 45 (1913) (“If nothing has come to knowledge to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is sufficient. If, on the other hand, directors know, or by the exercise of ordinary care should have known, any facts which would awaken suspicion and put a prudent man on his guard ... want of that care makes them responsible”).

with the business judgment rule in Delaware, Cede v. Technicolor, Inc., 634 A.2d 345 (Del. 1993), held that the “informed” component of the business judgement rule “requires a director, before voting on a proposed plan of merger or sale, to inform himself and his fellow directors of all material information that is reasonably available to them.” In its Technicolor opinion, the Supreme Court of Delaware suggested that directors make a “prudent search for alternatives.” The Supreme Court implied that as an alternative to a formal auction, to be properly informed, directors should provide for a “pre- or post-agreement market check mechanism.” As will be explained in Section III infra, I would carry this theme further and expressly require either a formal auction or a “market test” in all nonprofit conversion transactions.

d. The “rationally believes” requirement. The “rationally believes” test is the basis of the legal insulation provided by the business judgment rule.⁷² It affords directors and officers wide latitude when making decisions that meet the other prerequisites of the rule. But, as the ALI explained, there are objective outer limits to the protection this test affords:

There is no reason to insulate an objectively irrational business decision--one so removed from the realm of reason that it should not be sustained--solely on the basis that it was made in subjective good faith. The weight of authority and wise public policy favor barring from the safe harbor of [the

⁷² See 1 ALI Principles 179-85.

business judgment rule] directors and officers who do not believe, or do not rationaly believe, that their business judgments are in the best interests of the corporation.⁷³

C. Duty of Loyalty

As previously indicated, the legal obligations of directors and officers have traditionally been divided into the categories of duty of care and duty of loyalty. Allegations of neglect, mismanagement, and improper (but disinterested) decisionmaking are dealt with under the duty of care and the business judgment rule. Fraud, self-dealing, misappropriation of corporate opportunities, improper diversions of corporate assets, and similar matters involving conflicts between a director's or officer's interest and the corporation's welfare are considered under duty of loyalty statutes and caselaw.

As was true in the duty of care area, duty of loyalty standards in the for-profit sector have received extensive judicial and commentator attention during recent decades. The ALI Principles, for example, in the loyalty area (denominated "Duty of Fair Dealing") cover almost 200 pages.⁷⁴ These sources provide important guidance for the nonprofit community; I see no reason to repeat their analyses here.

For present purposes, the important issue worth considering is: Whether loyalty standards should be the same in the nonprofit and for-profit sectors? The New York Board of Regents' Adelphi case provides an excellent vehicle for considering this issue in

⁷³ 1 ALI Principles at 181.

⁷⁴ 1 ALI Principles at 199-382.

one loyalty area, “interested director transactions.”

Adelphi University purchased insurance through a brokerage firm owned by trustee Procope. The “material terms of which neither Procope nor Diamandopoulos ever disclosed to the board. Those terms include the issuance of broker of record letters and ... [Procope’s] receipt of fees since 1987 in the approximate amount of \$1,227,949.”⁷⁵ Under evolving but relatively well-settled loyalty standards, the failure to disclose constitutes a breach of the duty of loyalty.⁷⁶

What if proper disclosure had been made? Unless disinterested directors approved the transaction, state law would apply a fairness test -- the law’s most demanding test, with the burden of proof on those defending the interested transaction.⁷⁷ Similarly, even with proper disclosure, if a dominant group of directors and officers wished to buy a nonprofit corporation in a conversion transaction, a fairness test would apply. Section 5.15 of the ALI Principles provides the following rule of law:

If directors or principal senior executives of a corporation are interested in a transaction in control ... then those directors or principal senior executives have the burden of proving that the transaction was fair to the shareholders of the corpo-

⁷⁵ Fishman & Schwarz, 1997 Supplement at 12.

⁷⁶ The New York Board of Regents, in fact, found such a breach. Fishman & Schwarz, 1997 Supplement at 13; see, e.g., Boston Children’s Heart v. Nadal-Ginard, 73 F.3d 429 (1st Cir. 1996); 1 ALI Principles at 209-18.

⁷⁷ See 1 ALI Principles at 209-34.

ration....⁷⁸

State cases use tests like “entire fairness,” “intrinsic fairness,” and “inherent fairness” in these situations.⁷⁹ In general, what these terms mean is that the directors and officers will have to carry a heavy burden of showing that the acquisition process and price were fair (i.e., the best price reasonably available was received) to the corporation.

I see no basis for challenging these approaches. Professor Hansmann recommends “a flat prohibition against all self-dealing transactions involving controlling persons in nonprofit organizations.”⁸⁰ But, for me, the proposal is too inflexible, and particularly in the nonprofit sector, would prove both impractical and counterproductive. As Professors Fishman and Schwarz explain:

Wouldn't a total prohibition against any conflicts of interest by nonprofits be too severe, by carrying in its swath useful interested transactions that nonprofits, particularly smaller ones, need to survive? An absolute ban ignores the reality of much of the charitable sector.... Interested transactions are efficient.

The transaction costs are low. Interested directors may be

⁷⁸ 1 ALI Principles at 359.

⁷⁹ See, e.g., id. at 325-72; Paramount Communications Inc. v. QVC Network, 637 A.2d 34, 39 n. 9 (Del. 1994) (“When actual self-interest is present and affects a majority of the directors approving a transaction, a court will apply even more exacting scrutiny to determine whether the transaction is entirely fair to the stockholders.”).

⁸⁰ Henry B. Hansmann, Reforming Nonprofit Corporation Law, 129 U. Pa. L. Rev. 497, 569 (1981).

able to lend money or provide services or do business with a nonprofit at a lower rate because they know the organization best.... A nonprofit would often lose advantageous opportunities otherwise available to it if it were completely barred from entering into any transactions with any of its directors or any entity in which the directors have an interest.... Finally, as nonprofit organizations become more complex and professionally run, there may be greater need for individuals who happen to be interested directors. A nonprofit needs patron directors more than the patron directors need the nonprofit.⁸¹

The difficult issue in the nonprofit context comes if, after proper disclosure, a facially disinterested group of directors approves an “interested director transaction” or a conversion transaction proposed by a minority of the directors on the board. If for-profit precedents are used, most states, it appears, would apply the business judgments rule -- and its highly deferential “rationally believes” test -- to judicial reviewed of these transactions. Professor DeMott, on the other hand, proposes that such “self-dealing” transactions “be voidable unless the transaction’s proponents can affirmatively establish its fairness to the corporation at the time of the transaction.”⁸²

There is considerable strength in Professor DeMott’s position. She -- and I --

⁸¹ Fishman & Schwarz at 221.

⁸² DeMott at 143.

would worry about: (i) the tendency of nonprofit directors to defer to each other in an environment “not characterized by skepticism and analytical rigor”⁸³; (ii) the absence in the nonprofit sector of “extensive [SEC] disclosure requirements, enforcement machinery and private litigation”;⁸⁴ and (iii) the fact that nonprofit institutions generally do not have voting rights, appraisal rights, and other protections available in the for-profit sector that would lessen the dangers, at least with respect to certain significant transactions.

For these reasons, even where proper disclosure has been made and disinterested director approval is found, more rigorous judicial scrutiny than the business judgment rule affords should be available in the nonprofit context. The ALI Principles use an intermediate standard of judicial review -- more rigorous and intrusive than the “rationally believes” test of the business judgment rule -- for interested director and officer transactions in the for-profit contest.⁸⁵ It is clear that at a minimum such a test should be ap-

⁸³ Id. at 140.

⁸⁴ Id. at 139. Professor DeMott concluded that “apart from private foundations, the risk of attracting the wrath of the Internal Revenue Service does not operate as a deterrent to self-dealing that is comparable to the impact of the disclosure requirements” of the federal securities laws for for-profit public corporations. DeMott at 139. As the paper for this conference by Peter Swords demonstrates, the IRS requires a great deal of disclosure related to the duty of loyalty area. In the past, however, the IRS’s enforcement efforts have been seriously hampered by the severity (and focus) of inurement penalties and a lack of resources. It remains to be seen whether the new “intermediate sanctions” legislation, 26 U.S.C. §4958 (1996), which gives the IRS the power to tax and penalize “excess benefit transactions,” will have a significant impact in the loyalty area. See Douglas M. Mancino, New “Intermediate Sanctions” May Cause Public Charities to Change the Way They Do Business, 85 J. Tax’n 368 (1996). In general, both the loyalty responsibilities of the IRS and the special provisions under state law relating to the investment of funds (see Fishman & Schwarz at 229-37) are beyond the scope of this paper.

⁸⁵ See 1 ALI Principles (§5.02) at 209-34.

plied in the nonprofit context. Either a fairness test or an intermediate test would be consistent with the following observations by the Supreme Court of Delaware, sitting en banc, in Oberly v. Kirby, 592 A.2d 445, 468 n. 17 (Del. 1991):

Because of the special duty of the fiduciaries of a charitable corporation to protect and advance its charitable purpose, the court's review of an independent committee's approval would be more searching for a charitable corporation than for a for-profit corporation. If disinterested directors approved a transaction that posed a clear threat to the charitable purpose or assets of the corporation, their approval would be an *ultra vires* act and therefore not legally binding. Thus, even when an independent committee approved a transaction, the Attorney General would still have some leeway to challenge it. The extent to which the standard of review applicable to an independent committee's approval would differ from the standard of entire fairness applicable to the decisions of interested directors is a question that is not now before us. At very least, the burden of proof would rest upon the Attorney General rather than the directors in such a case.

In Oberly, the Supreme Court concluded:

Although principles of corporate law generally govern the activities of such a [charitable] corporation, its fiduciaries have a special duty to advance its charitable goals and protect its assets.

However, a charitable corporation is not barred from engaging in transactions in which its directors have an interest, as long as such transactions are intrinsically fair or are approved by a committee of independent directors.⁸⁶

For similar reasons, I suspect that most courts would accept my suggestion, at the National Center's conference last year, that they:

give special emphasis -- enhanced scrutiny -- to allegations of conflict of interest in conversion transactions. Subtle conflicts or "taints" to the process, which might be considered marginal in the for-profit context, should be resolved in favor of duty of loyalty (not business judgment) treatment in the nonprofit conversion context.⁸⁷

In general, this approach to interested transactions -- with respect to the standard for judicial review and the identification of conflicts -- should apply in almost all duty of loyalty areas involving nonprofit directors and officers.

III. Proposed Reforms

A. Self-Help: More Precise Specification of Functions, Guidelines, and Enhanced Educational Efforts

⁸⁶ 592 A.2d. at 472-73.

⁸⁷ Harvey J. Goldschmid, Nonprofit Conversion Transactions: Existing Fiduciary Duties and Necessary Reforms, in Conversion Transactions at 15-16.

The nonprofit community may be able to stimulate considerable governance reform by self-help steps, and thereby avoid unnecessary governmental mandates. During the past two decades, the for-profit sector has participated in a continuous series of governance discussions and dialogues -- and produced important practice recommendations, guidelines, and reports -- which have had a substantial impact on how for-profit corporations function.⁸⁸ The nonprofit sector needs a similar process.

One area that should be addressed relates to the functions of the nonprofit board. A whimsical commentator suggested that most of the “problems that befall... groups stem from the fact that boards have over the years, translated their [mandate] with as much variety as husbands and wives interpret their vows to love, honor and obey.”⁸⁹ Of course, there is insight in the suggestion that the enormous diversity of nonprofit institutions (e.g., in mission, size, economic consequences, and complexity) precludes too many bright-line strictures. But, as was true in the for-profit context, there are core functions of the board (which are legally required under the “shall be managed” statutory commands⁹⁰ and duty of care standards), and numerous governance (non-mandatory) options and techniques that could profit from reasoned elaboration and refinement.⁹¹

⁸⁸ See, e.g., Millstein & MacAvoy at 1-13; supra authorities cited in notes 19, 42.

⁸⁹ Fishman & Schwarz at 152 (quoting Melissa Middleton, Nonprofit Boards of Directors Beyond the Governance Function, in The Nonprofit Sector: A Research Handbook 141 (1987)).

⁹⁰ See supra text accompanying notes 39-43.

⁹¹ A most useful starting place for analysis is William G. Bowen, Inside the Boardroom: Governance by Directors and Trustees (1994).

Similarly, enhanced educational opportunities and guidelines of various types would be of considerable help to nonprofit directors and officers. Although guidelines now exist in specific sectors of the nonprofit community, the updating and refinement of existing guidelines, the development of new guidelines, and the tailoring of guidelines to the needs of particular nonprofit institutions are all needed. Especially in the broad duty of loyalty area, tailored guidelines -- with process specifications (e.g., the audit committee or general counsel must review...) and conduct specifications (which can be more restrictive than current loyalty law) -- should be available for the directors and officers of many institutions.

Among the other self-help steps that could enhance the quality of nonprofit corporate governance would be the development of guidelines for internal audit procedures, information systems, law compliance programs, board committees, and similar matters that would assist the board in overseeing, and the officers in managing, the nonprofit institution.⁹² An interesting self-help suggestion to the nonprofit community, made in an unpublished paper by a recent graduate of Columbia Law School and reportedly used by the Mellon Foundation, is that foundations use “restrictive gifts to address some of the [governance] weakness” found in nonprofit institutions.⁹³

B. Duty of Loyalty Modifications

As discussed in Section II C supra, I recommend two modifications of duty of

⁹² See supra text accompanying notes 60-63.

⁹³ Jed I. Bergman, The Ties that Bind? Using Restricted Gifts as a Nonprofit Governance Tool (May 1997) (unpublished manuscript on file at Columbia Law School).

loyalty law as it would be applied in a for-profit context. First, where there has been proper disclosure with respect to an “interested transaction” and then disinterest approval, or where these same steps have occurred with respect to other matters implicating the duty of loyalty (e.g., board approval of a director or officer taking a nonprofit’s corporate opportunity), the highly deferential “rationally believes” test of the business judgment rule should not be the standard for judicial review.⁹⁴ A fairness test, or at a minimum, the ALI’s intermediate test should provide the applicable standard of review.⁹⁵ Similarly, reviewing courts should give enhanced scrutiny to allegations of conflict of interest or dominating influence in the nonprofit context. Business and financial relationships, familial relationships, and “taints” to the process, for example, which might be considered of marginal concern in the for-profit context, should be resolved in favor of review under loyalty standards (and not the business judgment rule) when nonprofit institutions are involved.⁹⁶

C. Special Rules for Conversion Transactions and Similar Sensitive Transactions

At the National Center’s conference last year, I urged that a “new mandatory disclosure system” be established for conversion transactions, and I would now add, similar sensitive transactions.⁹⁷ I recommended that when conflicts of interest are not present, the business judgment rule be applied to all of the key decisions in a conversion transaction. I

⁹⁴ See supra text accompanying notes 85-86.

⁹⁵ Id.

⁹⁶ See supra text accompanying note 87.

⁹⁷ Harvey J. Goldschmid, Nonprofit Conversion Transactions: Existing Fiduciary Duties and Necessary Reforms, in Conversion Transactions at C12-14.

would, for example, apply the business judgment rule to: (i) the decision whether to enter into an agreement; (ii) a review of the fairness of the price and terms of the agreement; (iii) a decision by the board of a nonprofit hospital, for example, not to maximize the profit from a conversion transaction, but rather to protect a community's essential health services⁹⁸; and (iv) the decision about where -- in the nonprofit community -- to put the funds received in a conversion transaction.⁹⁹ I would, however, make four modifications in the traditional analysis that would be applied to conflict-free mergers and acquisition (similar to conversion transactions) in the for-profit sector. In addition to the enhanced scrutiny for conflicts discussed above, I suggested last year that:

1. The retention of disinterested outside experts should in almost all instances be required in significant conversion transactions.
2. Because of the difficulty of valuing nonprofit enter-

⁹⁸ I see no reason why a decision with respect to any trade-off between maximum price and community needs by a nonprofit's board -- assuming the decision is properly informed and conflict-free -- should not be protected by the standards of the business judgment rule. The word "business" in the business judgment rule sometimes causes confusion in the nonprofit context. For the policy reasons explained in Section II B supra, the business judgment rule should simply be thought of as a protective, highly deferential review standard for the judgmental component of a decision. It may be noted that even in the for-profit context, the business judgment rule is applied to many non-profit-maximizing decisions (e.g., whether to take account of ethical considerations and forgo profits, how many dollars to devote to humanitarian and philanthropic purposes even when profits will be lowered in the long term, and whether to put a specific law compliance program into effect). See 1 ALI Principles 55-70, 154, 173-74.

⁹⁹ Harvey J. Goldschmid, Nonprofit Conversion Transactions: Existing Fiduciary Duties and Necessary Reforms, in Conversion Transactions C14-15.

prises ... new legislation, new regulations by state charity regulators, and court decisions should impose a “market test” requirement before any conversion transaction can be consummated. The “market test” should provide for : (i) public disclosure of the proposed transaction; (ii) the provision of relevant information (subject to appropriate confidentiality safeguards) to responsible persons interested in making a competing offer; and (iii) adequate time for competing offers to be made.¹⁰⁰ A fair formal auction would, of course, meet the “market test” requirement...

3. [Similar to the approach on conflicts,] enhanced scrutiny ... should be used with respect to the placement of the proceeds of a conversion transaction into a new nonprofit foundation and with respect to any joint venture undertaken by the nonprofit entity (or its successor) and a for-profit purchaser.¹⁰¹

D. Enforcement and Process Reforms

Others at this conference will address disclosure and enforcement issues. For present purposes, it may be enough to state that we should increase the capacity of state

¹⁰⁰ Other provisions (e.g., dealing with lock-up concerns and break-up fees) -- both to facilitate the “market test” and to provide appropriate safeguards -- could usefully be added to new legislation or regulations.

¹⁰¹ Harvey J. Goldschmid, Nonprofit Conversion Transactions: Existing Fiduciary Duties and Necessary Reforms, in Conversion Transactions at C15-16.

charity regulators (and the IRS) to monitor the nonprofit sector and litigate where necessary. Because it is entirely unlikely that perennially understaffed state charity regulators will ever be able to handle their monitoring and enforcement functions alone, state legislatures and courts should approve the use of relator actions. A relator is generally a person authorized by a state attorney general to sue in the “name of the people when that right to sue resides solely in the attorney general.”¹⁰² In California, for example, the “attorney general controls the action at all times, and can at any stage of the proceeding withdraw, discontinue, or dismiss the action or assume the proceeding’s management.”¹⁰³ Costs and attorney’s fees can be awarded to successful relators for benefits they confer.

As indicated earlier, I would also cautiously open more room for donor, member, and beneficiary derivative actions. Except in the most unusual circumstances, it is the nonprofit corporation -- and not a class or individual -- that should be recipient of any monetary recovery. Less stringent standing rules would undoubtedly open the nonprofit sector to the danger of weak (but lawyer driven) or spiteful litigation. But statutory provisions or court decisions providing that legal costs and fees will be awarded against plaintiffs and their lawyers if an action is unreasonably brought or litigated could moderate some of the danger.

Plaintiffs would not, of course, receive attorney’s fees at the end of a litigation unless they were successful and conferred substantial benefit. As is true in all class and de-

¹⁰² See Fishman & Schwarz at 248.

¹⁰³ Id.

rivative actions, but would be particularly true of cases involving nonprofit corporations, courts (and state charity regulators) should play an active role in reviewing the fairness of settlements and the appropriateness of any award of attorney's fees. One would not expect courts to be overly generous to plaintiffs' lawyers in this area since any fee awarded would diminish the resources available to a public charity. In affirmative terms, less restrictive standing rules could provide significant (self-protective) incentives for more active nonprofit governance and could create the deterrence necessary to make substantive fiduciary standards effective.

For those willing to consider broader standing, the conversion transaction area is a particularly attractive one for experimentation. Nonprofit conversions are likely to be one-shot, decisive transactions in the life of the nonprofit entity. Plaintiffs' lawyers who come at these transactions with backgrounds in corporate and securities law could bring talent, expertise, and resources to any litigation; the limited number of such transactions would preclude enhanced standing resulting in a flood of litigation.

* * *

I opened this paper with a paradox: nonprofit directors and officers generally operate under the same state fiduciary standards as their for-profit peers, but in contrast to the for-profit world, fiduciary law plays little role in assuring accountability in the nonprofit sector. The explanation for the paradox should now be apparent. Highly restrictive standing rules and a lack of governmental enforcement have made duty of care and duty of loyalty standards almost wholly aspirational in the nonprofit sector. Although I have proposed several significant modifications in state fiduciary standards as they would

apply to nonprofit directors and officers, by and large I believe current for-profit standards work well in the nonprofit context.

The explanation for what I termed the “central paradox of nonprofit corporate governance” -- the fact that nonprofit institutions receive so much in public and private largess, but are subject to so few accountability constraints -- probably lies in some mix of history, naiveté, accident, inertia, fear of counterproductive effects, overemphasis on the nonprofit sector’s “independence,” and a good faith belief in the unvarying decency and honesty of those serving the nonprofit community. But as a friend and admirer of the nonprofit sector I ask: Can we continue to justify or afford -- and will the public continue to tolerate -- the relative ineffectiveness of nonprofit corporate governance and the virtual absence of accountability constraints? My answer is reflected in Section III supra.