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Unique Positions on the Board

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Association and chamber boards try to be inclusive. They add positions to the board in hopes of gaining insights from as many people as possible.

The positions are identified in the bylaws as emeritus, ex-official and public official. Let's call them ***unique positions*** for the purpose of this article:

Emeritus Director – A person is recognized for an achievement such as retirement, thus the title of emeritus conferred. The intent is to recognize the person and add stature to the board.

Ex-Officio – A person on the board who is there by virtue of holding another position. For example, a chamber may add the director of the economic development council as a part of its leadership team. Or the chief paid officer (executive director) may have a seat on the board as an ex-officio, with or without a vote as dictated by the bylaws.

Public Official – A person who holds office, whether elected or appointed, paid or unpaid, that is required to comply with ethics requirement and laws. For instance, asking the mayor's office to serve on the board would be adding a public official.

Past Presidents – Most boards include the immediate past chief elected officer as a voting member for a single term. A few organizations include all past presidents on the board perpetually. For example, these bylaws read: "All past presidents shall be ex-officio members of the board and shall have a vote."

Causing Confusion

The effort to be inclusive by adding unique positions to the board can cause confusion.

For example, do the positions have a vote? Are they liable for actions of the organization? Should they be covered by D & O insurance? Are their names submitted on IRS Form 990 as part of the governing body?

Interestingly, the State of California enacted a law in 2015 that non-voting members of the board are positions that may not exist. Board members, or directors, as they are termed in the law, each have one vote on any matter presented to the board for action.

Thus, in California any person entitled to attend board meetings without a vote is not a board member at all, even if your bylaws specify so. Canada adopted a similar law.

Personal Experience

Before I became the CEO at the Illinois Association of Chamber Executives, I was a member of an Illinois local board of education. We often discussed legal considerations and received briefings on conflicts and public records.

Many public officials are asked to serve on a private sector boards, for example a charity, chamber or association. Could conflicts of interest arise? Where will the loyalty lie?

Foremost, I knew my loyalty was to the Ball-Chatham school board and its stakeholders. Concurrently serving on public and private boards would have been very difficult for me. Accordingly, after my election, I chose to resign from a private board on which I served.

The Challenges

There are many considerations to inviting public officials, ex-officios and emeritus directors on the board.

Discussions – Does having public officials on the board change the dynamics of discussions and votes? For example, if a chamber wants to support a pro-business candidate and the mayor’s office is present and opposes, the discussion may be squelched.

Public Records – Communications with public officials may transform private documents into public record. While the private organization has very limited public records, mostly related to the IRS, distributing information to a public official may open communications and documents to the public. Their position may be subject to open records, government in the sunshine and freedom of information (FOIA) laws.

Use this example from a county government website to realize how communications with public officials might impact the association or chamber: “Communications with county officials are subject to the public records laws of the State of Florida,” and “E-mail addresses are public records. If you do not want your e-mail address released in response to a public records request, do not send electronic mail to this entity.”

Conflicts of Interest - It is reasonable to expect that a public official will be conflicted in support of their own entity. Conflicts must regularly be disclosed. The unique positions may have their own loyalties. Of course the members of a board must be loyal to the mission associated with the chamber or association.

Liability – Is it clear that the unique positions will have liability for decisions and actions of the organization? Should they and can they be covered by D and O insurance (directors and officers). Do past presidents, ex-officios, emeritus and public officials recognize any organization can be sued and they could be included in the suit. Do they have the same rights to indemnification?

Orientation – Private organizations conduct on-boarding so that all directors understand governance roles and responsibilities. Should it be required that all unique positions attend an orientation?

Reporting – One reason for including unique positions on the board is to benefit from their knowledge. During the meeting they are called on to report and update. Thus, they must sit through the entire meeting. It is possible to ask them to provide a report without asking them to join the board. Many would prefer to send a report or offer a 10-minute recap than to stay through a meeting.

Quorum – A quorum is usually defined at 50 percent of the board to conduct business. Are the ex-officios, emeritus, past presidents and public officials a part of the quorum count?

Voting – Do the unique positions have a vote? Voting rights will be prescribed in the bylaws. It has been observed even when an ex-officio has no vote, when the chair calls for a vote, *everybody* in the room has participated.

These considerations may persuade an organization to review their bylaws regarding board composition. Are there other ways to engage unique positions without adding more seats to the board table?

When considering these aspects, be sure to rely on legal, accounting and insurance counsel.

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Note: Lisa Weitzel, IOM, CAE, is president of the Illinois Association of Chamber of Commerce Executives (IACCE). Bob Harris, CAE, provides free governance tips and templates at www.nonprofitcenter.com.