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GOVERNANCE: IT'S NOT ROCKET SCIENCE

By David Goldstein, Esq.
Certilman Balin Adler & Hyman, LLP

At a recent board meeting with a new client, I found myself at the table with a number of brilliant and acclaimed scientists, some of whom had worked for NASA at different points in their careers. The board members' individual accomplishments aside, this organization's governance was abysmal. It was clear that the board had not been paying attention to governance matters. To bring this point home, I told the board that what many of them do *is* rocket science, but what I do most certainly is not. All that it takes for sound nonprofit governance is determination to follow governance requirements, together with discipline and attention to detail in implementation.

True, "**it is not rocket science**," yet here are some of the traps for the unwary that we see nonprofits fall victim to again and again.

Never Lose Sight Of Your Corporate Purposes. The Certificate of Incorporation was likely the first document your organization prepared. Many organizations lose track of this fundamental document or ignore its provisions. They do so at their great peril. Your organization's Certificate of Incorporation contains a statement of your organization's corporate purposes. **Any activities outside of the purposes stated in your Certificate of Incorporation are unauthorized and not permissible.** If you wish to conduct activities outside of the scope of the purposes stated in your Certificate of Incorporation (including expanding your purposes to accommodate new activities not originally contemplated), the Certificate of Incorporation can be amended to change the organization's purposes. Such an amendment by a charitable corporation requires obtaining the approval of the New York State Attorney General. An amendment of corporate purposes may also require notice to, or consent of, state regulatory agencies.

You Can Follow Your Bylaws, Yet Still Be Violating The Law. Bylaws are fundamental to the operation of any nonprofit. Bylaws are the internal rules for governing your organization. Yet Bylaws can be almost too easy to change. As opposed to your Certificate of Incorporation, your Bylaws are not reviewed by New York State, either initially or when

your Bylaws are amended. We very often see Bylaws that are rife with provisions that sound good but are inconsistent with the provisions of the Not-for-Profit Corporation Law and its many mandatory technical requirements. For instance, under the law a board is permitted to act without a meeting if all of the directors consent to the action being taken in writing or by email. An organization with 50 board members cannot have a bylaw that allows consent without a meeting by 49 of the 50. It is "**all or nothing**." Even if that fiftieth board member is out of the country or medically unable to give consent, the law requires that consent without a meeting must be unanimous to be valid. A new client came in recently with Bylaws that allowed consent without a meeting if 5 of the 7 directors provided consent in writing. This nonprofit had been scrupulously following this provision in their Bylaws for years. Because this bylaw was inconsistent with the law, all the actions taken in reliance upon it were improper and invalid.

Your Bylaws Can Unintentionally Prevent You From Taking Advantage Of Helpful Provisions In The Law. There can be important areas of flexibility permitted under the law that your Bylaws – often unintentionally – make unavailable to your organization. We most often see this in the areas of email notice and email consent, which have been explicitly allowed under New York law since July 1, 2014. Under the law, email is not considered a writing, so Bylaws need to provide for notice and consent using both modalities. But many nonprofit Bylaws contain outdated provisions that say that notice must be "in writing" or "delivered by mail or overnight carrier," thereby excluding email notice. Similarly, the unanimous consent without a meeting provision in many Bylaws contains an outdated formulation stating that consent must be "written," again excluding the use of email because under the law email is not considered a writing. We often find that organizations with these outdated provisions have been using email notice and email consents even though their Bylaws do not allow for this. The result, here also, is that actions taken by the organization can later be held to be improper and invalid.

Why do we care? After all, don't these governance missteps constitute harmless technical errors? Not by a long-shot. Acting outside of the nonprofit's purposes, or improper meetings or actions, each **constitute a breach of fiduciary duty on the part of the members of the Board of Directors. Breaches of fiduciary duty by directors expose those directors to potential personal liability under the law, and can also provide a potential basis for an insurance carrier to disclaim coverage under a nonprofit's insurance policy.** The moral of the story is that governance is most certainly not rocket science, but failure by a nonprofit to be sure to put its governance ducks in a row can have explosive consequences.

Certilman Balin Adler & Hyman, LLP, 90 Merrick Avenue, East Meadow, NY 11554
P: (516) 296-7000 f: (516) 296-7111, www.certilmanbalin.com

If you have questions about this edition of Nonprofit Legal Currents or your organization's governance practices and compliance with the Not-for-Profit Corporation Law, please contact David Goldstein at the phone number or email address below. Also contact us to request to receive future mailings.

About the Author

David Goldstein is a partner in the Nonprofit/Tax Exempt/Religious Organizations Practice Group at Certilman Balin Adler & Hyman, LLP, where he concentrates his practice in the area of not-for-profit law. He is the incoming Chair of the Not-For-Profit Corporations Law Committee of the New York State Bar Association's Business Law Section. Mr. Goldstein represents a broad range of international, national, regional and local not-for-profit entities across a wide variety of nonprofit sectors.
dgoldstein@certilmanbalin.com / (516) 296-7811.

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On Twitter,
@certilmanbalin

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