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Pharmacy Law Brief: Contemporary Legal Issues for Leadership in Non-Profits - I

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Question: I am new to serving on the board of a non-profit community health agency in my area. During one of the meetings an experienced board member mentioned something called “fiduciary obligations” that I have in that role. We had no orientation session for new board members. What is that?

Response: At the outset, it should be noted that an earlier column in this series, appearing in the November 2008 issue, was entitled “Potential Legal Exposure with Community Service as a Board Member of a Non-Profit Agency.” This installment will begin to address fiduciary obligations of board members and supplement or extend that earlier item. The specific focus of this item will be the potential for conflict of interest issues to arise.

A possibly high profile issue for board members is potential conflict of interest. In general, a conflict of interest exists when the non-profit organization which the board member serves does business with:

- a director of the organization;
- another entity in which a director of the organization is also a trustee, director, officer, employee, consultant or agent; or
- another entity in which a director has a financial interest (a “financial interest” can generally be defined to include an ownership or investment interest in the entity with which the organization is contracting, or a compensation arrangement with such entity).

To avoid even the appearance of a conflict of interest, a director may want to treat as a conflict any transaction between the organization and (i) the director’s spouse, descendants or ascendants; (ii) any entity in which such a relative is a trustee, director, officer, employee, consultant or agent or (iii) any entity in which such a relative has a financial interest.

If a conflict of interest is or may be present, the director should (a) disclose to the board of directors or relevant committee of the board the material facts as to

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his or her relationship or interest and (b) not participate in any board discussion or vote, unless the organization’s board determines that the director may participate in such discussion or vote. If the board determines that the director may participate, the director may still decide that a conflict exists and that he or she should not participate in any discussion or vote. The result of this is that if a director follows these disclosure and recusal procedures, a party challenging a transaction on the grounds of a conflict of interest/breach of fiduciary duty will face a heightened burden.

The best approach with potential conflict of interest is, first, heightened awareness of the potential for the issue to surface, and second, full and open disclosure to other members of the governing body. Then the decision about how substantial the potential conflict appears to be and whether that should bar the individual from participating in discussing and voting on the matter should initially rest with the other members of the board, not with the individual presenting the potential conflict.

A future installment will address other fiduciary obligations of board members.

Disclaimer: *The information in this column is intended for educational use and to stimulate professional discussion among colleagues. It should not be construed as legal advice. There is no way such a brief discussion of an issue or topic for educational or discussion purposes can adequately and fully address the multifaceted and often complex issues that arise in the course of professional practice. It is always the best advice for a pharmacist to seek counsel from an attorney who can become thoroughly familiar with the intricacies of a specific situation, and render advice in accordance with the full information.*