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Don't Let the Headlines Hide the Lessons for Your Boards

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Important lessons for nonprofit boards and their board members were hidden behind press headlines on June 14, 2018 when the New York State Attorney General Barbara Underwood filed suit against the Donald J. Trump Foundation, President Trump, and his three adult children, who were identified as board members of the Foundation.¹

Practitioners and board members on both sides of the political aisle may believe the suit is politically motivated and/or unique and therefore irrelevant to their organizations and board governance. It would, however, be a mistake for practitioners representing nonprofits (and their board members) to allow the identity of the parties and the associated headlines to hide the educational opportunity raised by an understanding of the suit's allegations.

Putting aside the high profile of the parties, the allegations provide a primer of actions that state and federal regulators expect nonprofit organizations and their board members to take and avoid. The allegations are, in fact, similar to those filed by three successive New York State Attorneys General against other organizations and boards that were effectively under the control of a cohesive group who allegedly did not effectively oversee the deployment of the organizations' assets for their corporate purposes and who, in some circumstances, included senior political operatives.²

In essence, the allegations express the expectations that nonprofit boards and board members must treat their positions seriously through the fulfillment of their duties of care, loyalty to the organization, and obedience to its mission by making sure that they, among other things:

- Oversee the operations and finances of the organization by following basic corporate formalities, including holding regular board meetings (at least annually) to review and discuss the activities of the organization and its assets, liabilities, and revenues, approve expenditures, and adopt internal control practices (including and especially conflict of interest policies and procedures, guidelines for grant issuances and in New York guidelines on investments and delegating management and investment functions);
- Oversee the deployment of the organization's assets (including its name and reputation) for its purpose and not allow those assets to be used to (i) financially or otherwise benefit individual board members (including their reputations) and their affiliates, (ii) advance board members' personal, political, or professional interests, (iii) purchase personal items for board members, or (iv) pay off the debts of board members or their associated organizations;
- Oversee the organization's staff, their supervision, and training, and not outsource important staff functions (such as internal accounting) to offices affiliated with or under the control of a board member without retaining oversight and approval (and without conducting the appropriate conflict of interest analysis) nor permit a single officer or other individual to deploy organization assets without any safeguards;

- Not cede control over charitable assets to other organizations (including political campaigns) or individuals who are not board members or officers of the organization;
- Understand that assessing whether the organization improperly benefits particular board members is not a mere financial calculus, but violations of the board's duties to the charitable organization may flow from promoting a board member's business, or benefiting their political activities and campaigns, or benefiting other charities for the purpose of enhancing the board member's reputation;
- Remember that it is not just the law that may limit the organization's and its board's actions, but so may the organization's certificate of incorporation (such as when it prohibits the assets of the organization from being used for political campaigns or activities) and other organizational documents, and board members are expected to be familiar with (and follow) such documents; and
- Ensure that governmental filings, including without limitation Form 990 filings made to the Internal Revenue Service and filings made to state charities bureaus, accurately reflect all of the activities and revenues of the organization, whether they be tax-exempt or taxable.

Lapses in these areas may imply or result in breaches of the directors' duties of care, loyalty, and obedience and also may raise problems under statutory and regulatory schemes applicable to the organization. Such failures may subject individual board members, as well as their organizations, to significant financial and reputational costs including criminal charges against one or more board members, officers or employees, and/or the forced dissolution of the organization.

Accordingly, whatever the merit of the June 14, 2018 suit, the public nature of the allegations in the action serves as a potential opportunity for practitioners to guide their nonprofit clients and boards to legally compliant and effective governance processes.

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¹ Press Release, *Attorney General Underwood Announces Lawsuit Against Donald J. Trump Foundation and its Board of Directors for Extensive and Persistent Violations of State and Federal Law* (June 14, 2018) <https://ag.ny.gov/press-release/attorney-general-underwood-announces-lawsuit-against-donald-j-trump-foundation-and-its>; *Underwood v. Donald J. Trump, Donald J. Trump, Jr., Ivanka Trump, Eric F. Trump, and The Donald J. Trump Foundation*, No. 451130/2018 (NY Sup. Ct. filed June 14, 2018) https://ag.ny.gov/sites/default/files/court_stamped_petition.pdf

² See, e.g., Press Release, *Attorney General Cuomo Charges Pedro Espada Jr and 19 Executives with Looting His Bronx Not-for-profit* (Apr. 20, 2010) <https://ag.ny.gov/press-release/attorney-general-cuomo-charges-pedro-espada-jr-and-19-executives-looting-his-bronx-not>, *Cuomo v. Pedro Espada, Jr.*, <https://ag.ny.gov/sites/default/files/press-releases/archived/Espada%20Complaint.pdf> (Apr. 20, 2010) (Then Democratic NY Attorney General Cuomo charged the former Democratic NY State Senate Majority Leader with, among other things, using a not-for-profit health care organization that he founded for his own personal and political benefit, installing a sham board in the nonprofit whose loyalty ran to Espada instead of to the nonprofit, filing clearly inaccurate state and federal filings, using the organization's assets for his own benefit and that of his political campaign, failing to ensure that the nonprofit's operations fulfilled its mission as set forth in its certificate of incorporation, and failing to cause the organization to maintain accurate books and financial controls. On May 14, 2012 the New York Times reported that the former State Senate Majority Leader had been criminally convicted by a federal jury on the associated criminal charges. Mosi Secret, *Ex-State Senator Guilty of Theft From Nonprofit*, N.Y. Times, May 14, 2012. <https://www.nytimes.com/2012/05/15/nyregion/ex-senator-espada-guilty-of-embezzling-from-soundview-health-network.html>. See also, Press Release A.G. Schneiderman Announces Settlement of Lawsuit Against Yisroel Schulman, Former President of NYLAG, for Breaching his Fiduciary Duty to NYLAG and Other Charities (Nov. 29, 2017), <https://ag.ny.gov/press-release/ag-schneiderman-announces-settlement-lawsuit-against-yisroel-schulman-former-president-nylag>.

https://ag.ny.gov/sites/default/files/file_stamped_summons_and_complaint_with_index_number.pdf (Schulman, the former President of the New York Legal Assistance Group (NYLAG) admitted to using funds from NYLAG for personal benefit, including to “enhance his reputation and standing in his community”. In addition, NYLAG’s audited financial reports were identified as being misleading, and it filed misleading reports to governmental regulators. As a result NYLAG agreed to implement a corrective action plan that included revisions to its various governance documents, enhanced internal controls, and a training program for new board members.) See also, Press Release, *Acting A.G. Underwood Announces Settlement with Self-Dealing Trustee of a Private Foundation* (May 21, 2018) <https://ag.ny.gov/press-release/acting-ag-underwood-announces-settlement-self-dealing-trustee-private-foundation> (The Richtenthal Foundation allowed its founder to obtain approximately \$500,000 in personal benefits from the foundation without its other directors providing adequate oversight or intervention due to its lack of adequate internal controls and the board’s failure to appropriately oversee its charitable assets. As part of the settlement the Richtenthal Foundation implemented new internal controls, board term limits, and board training.)

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