

An Attorney's Role on a Community Action Agency Board

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The issue of an attorney's role on a Community Action Agency's (CAA) board of directors has become more prevalent since the 2007 amendments to the Head Start Act required a Head Start grantee board of directors to have at least one board member who is a licensed attorney familiar with issues that would come before the board. However, if a licensed attorney is not available to serve on the board, a consultant or another individual with relevant expertise must work directly with the board.¹ The only guidance from the Administration of Children and Families (ACF, the division of the U.S. Department of Health and Human Services (HHS) overseeing the Head Start program) regarding this requirement is in the form of a Policy Clarification which, in response to the following questions, simply states:

1. *Does "licensed attorney" include an attorney who is licensed in a state other than the one in which the Head Start program is located?*
2. *Does "licensed attorney" include an attorney who is retired, and registered with the state bar but no longer required to maintain continuing legal education courses?*

As long as the individual is licensed to practice law and is 'familiar with issues that come before the governing body,' including issues under the laws of the state in which the grantee operates, he or she will be considered to have met the requirements of the Head Start Act.²

Due to the lack of additional guidance from ACF along with the new emphasis placed by Head Start on the inclusion of an attorney-director on or consultant to the board, many attorneys asked to join, consult with or remain on CAA boards are unsure of their roles.

The role of an attorney on a CAA board is different than the role of other board members in distinct ways. Like all other board members, attorneys on a CAA board are subject to state nonprofit corporate laws which impose two main fiduciary duties: the duty of care and duty of loyalty. In discharging these duties, non attorney-directors may be held to a "reasonable person" standard, which means the director must exercise the care of an ordinarily prudent person would exercise under similar circumstances.³ However, an attorney-director would more than likely be held to a higher standard – the "reasonable person" standard for someone with the same background.⁴

Additionally, the specific laws that authorize the different types of funding a CAA receives often either include requirements or offer guidance on the roles, responsibilities and expectations of all board members, including attorney-directors. The unique source of funding received by all CAAs is the Community Service Block Grant (CSBG) and the Office of Community Services (OCS, the division of HHS overseeing CSBG programs) offers guidance on the roles and responsibilities of CSBG board members in Information Memorandum 82.⁵ Additionally, the Head Start Act sets forth specific requirements for board members.⁶

In meeting the general board member requirements, attorney-directors often encounter issues distinctive to their service on the board because of their known expertise in certain areas of the law. The issues faced include: (1) role confusion, i.e., determining when they are acting as a director, attorney or both; (2) potential conflicts of interest involving the attorney-director's law firm/law practice, attorney's current and prospective clients and decisions to hire outside counsel; (3) the application of the attorney-client

privilege; and (4) the heightened liability exposure resulting from the attorney-director's competency to provide an opinion in an area of law in which the attorney-director does not regularly practice.⁷

The attorney-director must be prepared to manage the expectations of the other board members regarding the attorney-director's ability to provide legal representation and advice. An attorney who regularly provides legal services to a CAA and is asked to serve as an attorney-director on the board should consider several issues relating to this dual role. If the attorney director is providing free legal advice to a CAA or providing paid legal advice to a CAA that does not receive Head Start funds, the attorney should (1) consider whether performing the work for the CAA poses a conflict of interest and (2) clearly delineate for the board when he/she is acting as either an attorney or an attorney-director to ensure that attorney/client privilege is preserved. However, if the attorney is providing paid legal services to a CAA that receives Head Start funds, the attorney is prohibited from serving as a director on the board pursuant to the Head Start Act's conflict of interest provision which states that "[m]embers of the governing body shall . . . not have a financial conflict of interest with the Head Start agency (including any delegate agency)."⁸ Moreover, attorneys considering taking a position as an officer of CAA should be aware that federal grant funds may not be used to pay for professional services, including legal services, provided by a grantee officer or employee.⁹

Generally, an attorney-director is not a substitute for a CAA's inside or outside legal counsel. Most attorneys specialize in specific areas of law that may not be directly relevant to the organization and, even if an attorney-directory possesses expertise in an area of law relevant to a CAA, the attorney-directory's specialized knowledge does not absolve other directors from their fiduciary duties as board members. Ultimately, it is very important for attorney-directors and board members to be cognizant of the potential issues involved when an attorney director is also asked to serve as legal counsel for the CAA or board. The board should also not lose sight of the benefits, other than legal advice, that an attorney-director will bring to the board. An attorney-director provides a different perspective and adds an extra layer of vigilance to board deliberations and actions. Attorney-directors are invaluable for pointing out the red flags and for proposing procedures and methods for addressing matters..¹⁰

Like all directors, attorney-directors should disclose to the board any potential conflicts of interest and how such conflicts may prevent the attorney-director from performing his/her duties as a board member. The attorney-director may request that the board take precautionary measures to avoid conflicts such as not seeking paid legal services from the attorney-director's law firm/law practice. Attorney-directors should recuse themselves from any discussions or actions relating to the relationship of the attorney-director or his or her firm to the CAA, compensation of the firm, and any other matters in which the attorney-director has a personal interest. If an attorney-director agrees to take on a specific limited representation of the CAA, such as preparing restated articles of incorporation or an employment agreement for the executive director, the attorney should clearly explain in writing the extent of the representation. Moreover, an attorney-directory engaged in such representation should work with the board to carefully consider his/her ability to exercise independent judgment when deciding whether or not to participate in the board approval of any actions relating to the representation, such as voting on the restated articles of incorporation or the employment agreement.¹¹

As to the application of the attorney-client privilege, such would only apply to attorney-directors if they speak to the board as an attorney for the CAA. If attorney-directors assume such a role, they should communicate that role to the board and remind them of the how to preserve the attorney-client privilege. Lastly, attorney-directors' exposure to liability may be limited by their malpractice insurance (but such policies may exclude liability arising from board membership) and any D&O coverage carried by the CAA.¹²

¹ 42 U.S.C. § 9837(c)(1)(B)(iii), (iv) available at <http://eclkc.ohs.acf.hhs.gov/hslc/Program%20Design%20and%20Management/Head%20Start%20Requirements/Head%20Start%20Act/headstartact.html#642>.

² Policy Clarification, OHS – PC – E – 026 available at http://eclkc.ohs.acf.hhs.gov/hslc/Program%20Design%20and%20Management/Head%20Start%20Requirements/Policy%20Clarifications%20and%20FAQs/e_pc.htm#E026.

³ See Jack B. Siegel, *A Desktop Guide for Nonprofit Directors, Officers, and Advisors: Avoiding Trouble While Doing Good*, John Wiley & Sons, Inc. (2006) at 81.

⁴ Lisa A. Runquist, *The ABCs of Nonprofits*, American Bar Association (2005) at 21.

⁵ See Information Memorandum 82 is available at <http://www.acf.hhs.gov/programs/ocs/csbg/guidance/im82.html>.

⁶ See 42 U.S.C. § 9837(c)(1)(E) available at <http://eclkc.ohs.acf.hhs.gov/hslc/Program%20Design%20and%20Management/Head%20Start%20Requirements/Head%20Start%20Act/headstartact.html#642>.

⁷ See *Lawyers' Service on Nonprofit Boards, Managing the Risks of an Important Community Activity*, by Willard L. Boyd III, American Bar Association Business Law Today, Volume 18, Number 2, November/December 2008 available at <http://www.abanet.org/buslaw/blt/2008-11-12/boyd.shtml>.

⁸ 42 U.S.C. § 9837(c)(1)(C)(i) available at <http://eclkc.ohs.acf.hhs.gov/hslc/Program%20Design%20and%20Management/Head%20Start%20Requirements/Head%20Start%20Act/headstartact.html#642>.

⁹ 2 C.F.R. Part 230, App. B, paragraph 37.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*