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**NONPROFIT FORUM**

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**Should the Executive Director of a Nonprofit Serve on its Board?**

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## NONPROFIT FORUM

### Should the Executive Director of a Nonprofit Serve on its Board?

Jonathan A. Small

I'm raising before the Nonprofit Forum the question of whether a nonprofit's executive director should also serve on its board:

(a) because the question has broad application and significant governance implications; and

(b) because, despite the extensive literature about the functioning of nonprofit boards, I've found relatively little material that seeks to analyze the question by weighing the pros and cons (and, in particular, by considering analogies to for-profit corporations).

In this paper, I refer to the senior staff person of a nonprofit as its "executive director" (E.D.), but alternative titles abound – President, CEO, President and CEO, Artistic Director, Director, etc.

Possible answers to the question posed include the following:

(a) yes;

(b) no; and

(c) it doesn't matter.

To address the question, I seek below to (I) consider the respective roles of the E.D. and of the board, (II) review a range of practices that seem relevant to the issue, (III)

highlight the pros and cons of having the E.D. serve on the board and (IV) offer my view as to the “right” answer to the question posed and raise some related questions.

For those impatient to know my view -- I believe that the E.D. should be on the board. In fact, I believe that a first-rate E.D. should be a nonprofit’s most valuable board member.

I. Roles of the E.D. and the Board.

1. Role of the E.D. of a Nonprofit. A nonprofit’s E.D. is, of course, its most important staff member, responsible for running the organization. The E.D. plans and executes program activity in accordance with the wishes of the Board, secures funding (with the help of the board, if she/he is lucky), hires, fires and evaluates staff, and seeks to assure compliance with applicable laws, regulations, best practices, contract terms and government conditions and obligations, among other tasks. The E.D. is subject to supervision and oversight by the board.

One form of model by-laws for a Delaware nonprofit (in the Debevoise files) describes the job of the E.D. (therein called the “President”) as follows:

The President shall be the chief executive officer of the Corporation, have general control and supervision of the affairs and operations of the Corporation, keep the Board fully informed about the activities of the Corporation and see that all orders and resolutions of the Board are carried into effect. He or she shall manage and administer the Corporation’s business and affairs and shall also perform all duties and exercise all powers usually pertaining to the office of a chief executive officer of a corporation. He or she shall have the authority to sign, in the name and on behalf of the Corporation, checks, orders, contracts, leases, notes, drafts and all other documents and instruments in connection with the business of the Corporation. He or she

shall have the authority to cause the employment or appointment of such employees or agents of the Corporation as the conduct of the business of the Corporation may require, to fix their compensation, and to remove or suspend any employee or any agent employed or appointed by any officer or to suspend any agent appointed by the Board. The President shall have the duties and powers of the Treasurer if no Treasurer is elected and shall have such other duties and powers as the Board may from time to time prescribe.

Some by-laws contain more general language giving the board responsibility for defining the roles of officers, such as: “Subject to the control of the Board, all officers as between themselves and the Corporation shall have such authority and perform such duties in the management of the Corporation as may be provided by the Board of Directors and, to the extent not so provided, as generally pertain to their respective offices.” Other by-laws simply state that there “shall be an Executive Director” without specifying duties.

As to interaction with the board, the E.D. accounts to the board at board and board committee meetings, by memoranda and other written materials, such as budget and program reports, and informally, by phone and e-mail.

Regardless of whether she/he is on the board, the E.D. ordinarily is an active participant in discussions at board meetings.

If the E.D. is on the board, the E.D. is, in terms of legal status, the peer of the other board members (assuming she/he has a vote, discussed below), as well as an employee of the nonprofit. If the E.D. is not on the board, the E.D. attends the board

meetings, or a portion thereof, at the board's invitation and simply as an employee reporting to the board.

What the foregoing description of the E.D.'s role does not capture, however, is the distinction between (a) "running" the nonprofit day-to-day and (b) engaging in strategic thinking and planning for the nonprofit's long-term future. Consider, for example, a nonprofit running a soup kitchen. The nonprofit's board may want an E.D. who will see to acquiring food, cooking it and serving it -- period. Alternatively, the nonprofit may want an E.D. who will also consider, for example: (a) whether other services -- such as health care or housing assistance -- should be provided to those attending the kitchen, and how to provide them; (b) whether the kitchen should be opening facilities at other locations; and (c) whether the kitchen should be partnering with or merging into other organizations serving the population it serves. These two models contemplate very different roles for the E.D.

2. Role of the Board. Under New York Law, "Except as otherwise provided in the certificate of incorporation, a corporation shall be managed by its board of directors." N -PCL, § 701(a). The February 2006 "Exposure Draft" of the ABA Business Law Section's work on a "Revision of the Revised Model Nonprofit Corporation Act" provides in section 8.01 (b):

"All corporate powers must be exercised by or under the authority of the board of directors of the nonprofit corporation, and the activities and affairs of the corporation must be managed by or under the direction, and subject to the oversight, of its board of directors."

This Exposure Draft is, of course, closer to reality than is New York law in describing the role of most nonprofit boards. While some boards can be said to “manage” the nonprofits they serve -- particularly very small nonprofits -- most nonprofits are better described as being managed “under the direction, and subject to the oversight, of” their boards.

Implicit in this general description are at least four different roles that I believe are played by an effective board.

a) Oversight. The board should oversee the work of the E.D. in running the nonprofit. The board’s finance committee should review and approve the budget proposed by staff and should monitor the nonprofit’s progress in meeting that budget. The work of the audit committee and the committee to review the E.D.’s performance are further examples of this oversight role. The board is also responsible for refreshing its membership through the nominating process for directors.

b) Expertise on Non-Mission-Related Subjects. Often a board, particularly of a smaller nonprofit, provides expertise lacking in the staff -- e.g., as to real estate matters such as leasing, or financing techniques. Here the board is effectively filling a staff function (or the role of an outside advisor).

c) Expertise as to Mission-Related Functions. A fortunate nonprofit will have on its board at least one or two people with expertise as to the nonprofit’s mission -- e.g., a head of another school in the case of a board of a school. Such a person can offer useful insights from her/his experiences that can be very helpful to the E.D.

d) Ultimate Decision-Making as to Mission-Related Activity -- Strategic Planning. A board is supposed to determine what the nonprofit is trying to do and, in general, how it should go about seeking to achieve its objective. If a nonprofit is trying to “help the homeless,” the board must decide how the nonprofit is going to use its resources to pursue its goal. This is the task that is generally perceived as the key role of a nonprofit board.

The role the board envisions for the E.D. is crucial in considering whether the E.D. should be on the board. If the board conceives of the E.D. as playing some role in strategic planning, even if a subsidiary one -- and not as simply “running” the soup kitchen, for example -- that would seem to point towards a board role for the E.D.

But even if the Board wants the E.D. simply to “run” the soup kitchen, it is fair to ask whether the board is smart to do so. Also, even if one concludes that the Board is smart to do so, or at least reasonable under the circumstances to do so, a further question is whether the board would benefit from having input from the E.D. at the board level to help the board with its strategic decision-making.

## II. What Are Common Practices as to the E.D. Serving/Not Serving on the Board?

1. Statistics. I found few statistics as to whether it is more or less common for the E.D. of a nonprofit to be on the board. In August the Nonprofit Coordinating Committee of New York (NPCC) asked each senior contact on its 1400+ list of nonprofit members to respond to a brief survey on this subject. It got 358 responses (but not all respondents responded to all questions). In summary, the responses were split almost exactly 50-50 as to whether the E.D. was or was not on the board (50.8% yes/49.2% no).

Slightly more than half of the respondents (54.5%) thought it was important for the E.D. to be on the board and 45.5% did not (but we don't know if those saying that it was important for the E.D. to be on the board (or not) were from organizations where the E.D. is (or is not) on the board, as responses were anonymous. Also, we got fewer responses to this question as to whether it was important for the E.D. to be on the board than we did to the question as to whether the E.D. was on the board, suggesting that perhaps more respondents from nonprofits with the E.D. on the board were inclined to respond to this question). 36.8% of respondents thought it was important for the E.D. not to be on the board. (See attached summary of survey responses.)

In addition, I reviewed (with help from NPCC) approximately 200 identifiable NPCC members (from the links to them on the NPCC website). These organizations were, for the most part, randomly selected by alphabet letters; I picked a few others about which I was curious. This survey showed that about 52% had the E.D. on the board -- a result basically consistent with that of the NPCC survey, described above. (Please see attached data as to specific organizations.) In general, human services organizations did not have the E.D. as a board member. Museums and foundations tended to include the E.D. as a board member. The websites almost never reveal whether those E.D.s that are on the board have voting rights.

2. Some Views of Authorities. While some literature discusses the question raised here, relatively little takes a position on it. Thus, it appears that the issue of whether the E.D. should be on the board is not considered to be of great moment. For example, the BoardSource Nonprofit Governance Index compiled from time to time (the



one done in 2004 is the latest) does not ask whether the E.D. is on the board. Examples of brief discussions are in Dan Kurtz's new book with Sarah Paul for BoardSource, *Managing Conflicts of Interest* (2d ed., 2006) and in Evelyn Brody's ALI project on the law of Nonprofit Organizations, *Principles of the Law of Nonprofit Organizations – Discussion Draft* (April 6, 2006), pp. 110-111 (American Law Institute). Here, for example, is Dan's and Sarah's overview on the subject (at page 35):

**“Should the chief executive serve on the board of directors? What role may the chief executive play on the board?”**

There is no general agreement on whether the chief executive should serve on an organization's board, although it is becoming increasingly common. Many organizations believe that excluding the chief executive from serving as a voting board member diminishes his status and weakens the role of management. These organizations, therefore, include the chief executive as a voting member of the board.

Some organizations believe that it is not a good practice to have the chief executive serve on the board, however. Those organizations believe it blurs the distinction between the role of the board and that of the chief executive. For that reason, those organizations have their chief executives serve as ex officio, nonvoting members of the board . . . . Service on the board in an ex officio, nonvoting capacity allows the chief executive, during board meetings, to share his perspective and professional judgment on a wide variety of issues affecting the health and future of the organization. Whether the chief executive serves as a voting or nonvoting member of the board, the board will always be able to exclude the chief executive from a discussion on the chief executive's performance or compensation.”

My only quarrel with this excerpt is that it is silent as to the many nonprofits that do not have their E.D.s on the board, i.e., the E.D. is not even an ex officio non-voting member. (The term “ex officio” seems to generate confusion; many seem to think it means “non-voting board member” rather than “serving by reason of the office held.”)

The Council on Foundations also discusses the question of having the E.D. on the Board from the standpoint of a foundation and notes in part:

“CEOs who sit on the board hold a position of great privilege but also great responsibility. With an equal voice at the board table, CEOs can enjoy more stature and influence among board members. Yet, at times, they may feel conflicted between the two roles – caught in a constant balancing act between day-to-day operations and big-picture decisionmaking. In a similar debate, some boards believe that the CEO should be on the board to help inform their decisions; others think it gives the CEO too much power.”

In addition, Evelyn Brody’s paper given at the University of Heidelberg this July contains an excellent overview of the relevant materials and I cite it here, with permission, in lieu of repeating the references it contains. Brody, the Board of Nonprofit Organizations: Puzzling Through the Gaps Between Law and Practice, Sec.3 -- Inside the Black Box: Board/Management Relations.

3. History as a Guide. As to the general absence of the E.D. on the boards of social service organizations, Dan Kurtz has (again) provided helpful input. In his view, the “on” or “off” the board status of the E.D. had little to do with a good governance analysis of what is best for the organization and a lot to do with ingrained and longstanding socio-economic considerations – however unstated and, most likely, unconsidered. His point is that the boards of social service organizations were and are peopled by individuals having a certain social caché – Mrs. Astor types, for example – and that the E.D.s of such organizations are ordinarily people with a hands-on social work background, who have not historically been of the same social class as the board.

Those boards have tended to “hire an E.D.” but not to think of the E.D. as one of them – which has translated into the E.D. not being on the board.

I suspect that the same socio-economic considerations that tend to result (or to have resulted) in E.D.s of social service organizations not being on the board also tend to result in E.D.s of museums and foundations being on the board. Heading a museum or a foundation apparently carries considerably more social cachet than heading a homeless shelter.

Interestingly, the surge in E.D. compensation for certain parts of the nonprofit universe – spurred by public disclosure through Guidestar – probably reflects the distinction I am making. Boards consisting of successful business and professional people may tend to think of E.D.s of foundations and museums as their peers. As these business and professional people make a lot of money, it is natural for them to believe that their foundation and museum peers should be adequately paid as well, by their own generous standards as to adequate pay. In the case of an E.D. of a social service organization, who is a non-board member and thus a non-peer, the instinct to relate the E.D.’s pay to that of board members is likely to be significantly reduced. This may well explain, in part at least, the fact of lower pay, in general, for the E.D.s of human services organizations.

Of course, the pay differential can be attributed to the amount of assets controlled by human services organizations, on the one hand, and museums and foundations on the other hand. We live in a capitalist society and access to assets is access to power. That

may also explain why foundation and museum E.D.s are more likely to be considered peers of their board members than are E.D.s of human services organizations.

At any rate, my point is simply that, as far as I can tell, the general dichotomy as to board service for E.D.s of foundations and museums and non-board service for E.D.s of social service organizations is not grounded in views of corporate governance but more in cultural or socio-economic considerations of long-standing.

4. “Standards”: BBB. The standards promulgated by the Better Business Bureau’s (BBB’s) Wise Giving Alliance neither favor nor oppose having the E.D. on the Board. Those standards require a nonprofit -- to gain the BBB’s seal of approval -- to have only one paid staff member (or other person receiving compensation from the nonprofit) on the board or, if more, no more than 10% of the board may be paid staff members (or other individuals compensated by the nonprofit). Thus, in the case of the board size generally viewed as best from a governance standpoint (i.e., about 10 board members), board membership of the E.D. is consistent with achieving the BBB’s seal of approval, but the BBB’s discussion of this standard nowhere suggests that having the E.D. on the board is a good idea.

5. Other Rules: Other rules here and there are consistent with the bias I perceive in some materials against having staff on a nonprofit board. For example, in the state of Washington, in general, nonprofits with eight or more board members, none of whom is a paid employee, are exempt from the otherwise applicable state “business and occupations” tax. RCW 82.04.431. Also, I understand that certain government contracts/grants preclude nonprofits from having staff on their boards. (California,

however, prohibits a public benefit corporation from having a majority of its directors be “interested parties.” I believe virtually all students of the subject would ordinarily consider it undesirable to have anywhere near 50% of the Board be “interested parties.”)

6. Inattention to the Issue: My sense from many discussions is that whether the E.D is on the board, or not, is a matter of long-standing practice that is taken for granted at most nonprofits without being given much, if any, consideration. I myself have never been at a board meeting at which someone has said: “I think it’s a mistake to have the E.D. be [or not be] on our board.” (I ask my readers to consider the extent to which they – a non-profit governance elite – have given attention to this issue as to boards on which they serve, or advise, and if so, whether they have thought of it as an important issue.)

In the case of new nonprofits, my guess is that, in many cases, the model by-laws offered by the lawyer helping to create the entity are themselves the result of decisions taken perhaps generations ago by lawyers long gone who themselves gave little thought to the topic. Thus, some models do and some do not treat the E.D. as a director.

My favorite illustrative anecdote regarding inattention to the issue – pre-cleared for disclosure, I should note, with the person involved – concerns a highly successful nonprofit E.D. with many years of achievement in leading and developing a small nonprofit. As it happens, that E.D. had considerable experience with nonprofit governance issues. I discovered, however, that that E.D. had never focused on whether he was or was not a board member and my sense is that none of his board had either. He was on the board, as it happened, but the point is that that status was apparently irrelevant

as to how he perceived and performed his role as Executive Director, and as to how he was perceived as performing it.

As you probably have guessed, that illustrious E.D. was none other than our own Peter Swords. He was doing a great job and board member status was apparently irrelevant to him and to his board in defining his role.

While the fact that little attention is paid to a subject does not necessarily mean that the subject is unimportant, that may be the case in some circumstances. Hence, I cite Peter as support for the answer that, in some circumstances, "It doesn't matter" whether the E.D. is on the Board. Be that as it may, for the reasons given below, I don't think it is a good answer in terms of fostering the best nonprofit governance.

7. Views from the Field. I've discussed the question of whether the E.D. should be on the board, or not, with numerous colleagues connected with the nonprofit sector and have gotten an interesting array of comments. Some people I talked with feel strongly that the E.D. should not be on the board. Their main point, a governance point, is that the Board oversees the E.D. and so it is not appropriate to have the E.D. involved in overseeing her/himself -- an apparent conflict of interest. In addition, many of those with this view fear that the E.D. will dominate the Board if the E.D. is on it -- and stifle views other than those of the E.D. As discussed below, banning the E.D. from a board role -- thus diminishing the role of the person I see as the most useful board member -- seems to me to be a poor way to deal with the concern that the E.D. will dominate the board.

Those favoring having the E.D. on the board do so out of a general feeling that the E.D.'s input is crucial to the board and so the E.D. should be on the board to give that input as a peer. Others take the somewhat more nuanced view that the E.D. and the board should be peers in each others' eyes but that that does not necessarily require the E.D. to be on the board.

8. The For-Profit Corporate World. In the for-profit, corporate world, it seems to be a given, universally accepted (or almost universally accepted – I know of no exceptions) that the CEO is on the board. I have found no discussion of why this is the case and none that seeks to explain why the situation is different for some nonprofits, or should be.

In his well-respected book, Inside the Boardroom, (John Wiley & Sons, Inc., 1994, pp 46-47) William Bowen makes the case for “having some insiders on a corporate board *beyond* just the CEO” (italics mine) as follows:

- “Inside directors can provide useful information and new insights. This can be especially important on boards that require technical sophistication and yet are precluded from appointing the most knowledgeable outsiders by conflicts of interest and antitrust laws. Informal relationships between inside and outside directors can facilitate substantive exchanges of ideas by establishing peer relationships and, as one person put it, ‘encouraging less stilted conversations.’
- “Succession planning is helped when directors have regular opportunities to evaluate leading contenders in a board setting.

- “The election of key management personnel to a board is an indication of their importance. Giving carefully selected individuals a ‘privileged relationship’ with the board can be decisive in strengthening their allegiance to the company and, therefore, in reducing the likelihood that they will be tempted by outside offers.”

To me, this case for having staff members on the board – and more than one – seems applicable as well to non-profits and is particularly forceful in supporting the view that a nonprofit board should include at least one staff member, the E.D. (Perhaps in the smallest nonprofits there is no one beyond the E.D. who could make a meaningful contribution to the board’s deliberations.)

As to whether nonprofits should also have staff on the board in addition to the E.D., Bowen addresses this issue in one paragraph that I have found cryptic. He says:

“In the case of nonprofits, it is rare for any insider, other than the president or CEO, to serve as a voting member of the board, though arrangements are often made for key individuals to meet regularly with the board and sometimes to serve in nonvoting capacities. This structural difference is rooted in distinctive organizational structures (there is less hierarchy in most nonprofits, and less likelihood of promotion to CEO from within). The presence of inside directors is simply much less of an issue.”

Except for the point made above about small nonprofits often lacking staff, beyond the E.D., who would be helpful in board deliberations, I do not see why, as an analytical matter, nonprofit boards should be viewed differently from for-profit boards in assessing the value of having staff on the Board. The absence of discussion of this point in the literature I have found has been mystifying to me.



9. Boards of Mutual Funds. The make-up of the board of a mutual fund offers another perspective on the “Should-the-E.D.-be-on-the-board?” question. A mutual fund typically has no employees and, in particular, no senior management employees doing work analogous to that of a CEO and a CFO in a typical for-profit corporation. Instead, the mutual fund hires a management company to do the fund’s work, as an independent contractor. The board consists of outside directors and one or more members of the management company. At board meetings, the members of the board who are from the management company fill the role(s) traditionally filled by corporate officers serving on the board. Nonetheless, my understanding is that the dynamics of such meetings are somewhat different from those of a typical for-profit board meeting. As an independent contractor service provider, the management company is inherently in more of a “they” role, and in less of a “we” role, vis-à-vis the independent directors, than are the board member officers of a corporation. In large part, that is because re-hiring the management company on an annual basis, and setting the fees to be paid to it, are the paramount roles of the independent directors. While a typical for-profit board effectively rehires management each year, as well, doing so is less of a focus of board activity than is the case for the board of a mutual fund. Accordingly, in the case of a mutual fund board, the process of rehiring the management company each year serves to focus the attention of the independent directors on their management oversight function in a way that, I believe, tends to reduce the prospect that the independent directors will be dominated by the management company’s board representatives, especially in the current climate of greatly increased scrutiny of for-profit board governance. Thus, even where the head of the

management company serves as the board chairman of the mutual fund, I believe there is an increased likelihood that the independent directors will be more attuned to the issue of management domination of the board than is the case in a classic for-profit corporation.

A lesson I draw from the mutual fund board structure is that, even where the issue of management domination is front-and-center for the independent directors, management is still significantly represented on the board (with the current hot issue being simply whether the board chair should be from management, not whether management should be off the board). Thus the mutual fund world seems to have a strong consensus view that management representation on the board is important, presumably for the reasons set forth by Mr. Bowen above. As noted above, I have been surprised that the literature on nonprofit boards seems to ignore the CEO-on-the-board model of the for-profit world.

10. Law Firms as Another Model. Law firms offer an intriguing alternative to the board/management governance system used by corporate-form for-profits and nonprofits. Do we think that the extremely successful Simpson, Thacher and Bartlett, for example, would be better run/overseen if it had an outside board of directors? I believe that Simpson's management – its partners in management roles -- would not readily be improved by any outside group. Who has better information than those partners to guide them in deciding what Simpson should, and should not, be doing to sustain and enhance its success. Might a board simply produce a series of middle-of-the road, take-no-chances decisions that would move the firm inexorably into a good but not great position in the legal firmament.

Wachtel and Cravath are also striking examples of the idea that management solely by insiders works well. In an era where the common mantras are “scale,” and particularly the need for a global “presence,” these two firms have succeeded splendidly by staying small, with few offices. Presumably, they have done that by achieving a cohesiveness of view as to how best to manage their firms. Would outside boards, exercising real power, have served either of them better than the management/oversight system they have had. At the other end of the spectrum is Skadden Arps, which has grown steadily to be an international behemoth. It, too, has succeeded splendidly without outside oversight or direction.

Of course, some law firms have failed and dissolved. Finley, Kimble had its problems -- some bad acts by some bad actors that sullied its reputation. Donovan, Leisure also declined and closed following revelation of improper conduct by a partner. Would these acts have been forestalled by a board with a majority of independent directors? Maybe, but I doubt it.

Thus, one conclusion that might be drawn from the law firm partnership model is that perhaps the role of the outside board may be a bit over-rated as to its ability to set strategy and objectives and that, therefore, having some management representation on the board (the E.D. at a minimum) is a major plus as to long-term planning. (Outside directors for a nonprofit are, of course, vital as to oversight and E.D. evaluation functions.)

### III. Pros and Cons of Having the E.D. on the Board.

#### 1. Cons

a) Fear of E.D. Domination of the Board. This is clearly an important consideration. E.D. domination of the board prevents the board from performing meaningful oversight and can lead to disaster if the E.D. is doing a bad job. (Interestingly, if the E.D. is doing a great job, E.D. domination of the Board is largely irrelevant.)

But how relevant is having the E.D. on the board to the question of E.D. domination of the Board? First, the E.D. can dominate the Board without being on it. The E.D.'s presence as a key player at board meetings raises the prospect of domination much more than does board member status itself, in my view.

Second, having the E.D. on the board does not necessarily mean he/she will dominate it. That depends primarily on other factors, such as: the personality and competence of the E.D., the personality and competence of the Board chair, the size of the board, the E.D.'s period of service as E.D., the other board members' periods of service on the board, and the relative education, social status and competence levels of the E.D. and the board.

In short, I believe that the E.D.'s power vis-à-vis the board is derived principally from the respect the E.D. succeeds in generating for her/himself – the E.D.'s overall presence, including performance at board meetings – not from the E.D.'s title as a board member (or not), though the presence or absence of that title may affect how the E.D. presents her/himself and so may affect how the E.D. is perceived. I believe that, in some

organizations, the absence of the E.D. from the board is taken as, and is intended as, a message about the E.D.'s lesser status relative to the board. But, in general, I think that the E.D.'s performance, not title, is crucial in determining her/his status vis-à-vis the board.

Another perspective on the concern about E.D. domination is to focus on the rest of the Board, instead of the E.D. A good board, with capable, strong people on it, will not be dominated by the E.D., but will be greatly assisted by input from an able E.D.

In addition, the bigger the board, up to a point, the less significant the status of the E.D. as a director. A board of three is more likely to be dominated by the E.D. than, say, a board of twelve. However, as the size of the board increases, the risk of board passivity and thus E.D. domination tends to increase.

The for-profit corporate world provides some food for thought as to the fear of E.D. domination. As noted, a common for-profit corporate model is to have the CEO not only be on the board but also to be its chairman. It is also common for several other corporate officer/employees to be on the board as well. As you know, this model is being questioned and is in the process of changing. Pressures are rising to have a non-executive as board chairman and to have fewer corporate officer/employees on the board and more "independent" directors in their place. (However, see attached excerpt from a recent ExxonMobil proxy statement in which the board and management argue forcefully against a shareholder proposal to have a non-executive chairman.)

Accordingly, the tendency among some students of nonprofits to look to the for-profit corporate world for governance models to be emulated is an unfortunate one, in my

view, if the emulation promotes the view that the CEO should serve as board chairman as well. There the risk of staff domination is greatest and has led to major for-profit corporate debacles precisely because of that domination.

However, taking the argument against having the CEO as board chair and extending it to keeping the CEO off the board takes the argument too far in my view. As noted, if fear of CEO domination exists, the board should examine itself. That fear contemplates a board that is too weak and not a CEO who is too strong.

Also, we need to keep in mind that a board that regularly goes along with its E.D. is not necessarily dominated by the E.D. The E.D. may simply be doing an excellent job and the board would be foolish not to go along with her/his view as to how the nonprofit should function.

Another take on the E.D. domination concern is to ask what it means to keep the E.D. off the board. If doing so reduces the “risk” of domination by the E.D., it also may reduce the E.D.’s ability to affect the board’s decisions. To the extent that the E.D. would use his/her board status (if given) to promote bad decisions, having the E.D. off the board is a plus. But, if that is the case, the board should hire a new E.D. If the E.D. is a good E.D., having her/him on the board should be a plus in that the enhanced influence inherent in the E.D.’s position on the board should foster better decision-making by the board.

A related point is that the board’s impact and effectiveness may be weakened, not strengthened, by keeping the E.D. in non-board, hired-hand status. If the E.D. feels that she/he is “only a hired-hand,” the board is less likely to get the full benefit of the E.D.’s

views, and to have as an E.D. a person whose views are thoughtful and constructive, and so the board's own ability to be constructive is likely to be reduced.

b) Concerns as to Conflict of Interest in Having the E.D. on the Board.

Some people I spoke with expressed an instinctive aversion to the idea that the E.D. might serve on a board whose inherent responsibility is to evaluate the E.D. This is a fair point but not an important one in my view. The key point about conflicts of interest is that they need to be dealt with properly. While taking steps to avoid them altogether is one way of dealing with them, that can deprive a nonprofit of a key source of talent. If, for example, an insurance broker who is a highly talented board member might be a desirable broker for the nonprofit to use, the nonprofit can take steps to assure that her/his insurance offerings are evaluated against alternatives by a disinterested board committee and selected only if they are objectively the best. The broker need not be required to leave the board in order to have the nonprofit use her/him as its broker.

Similarly, the facts that the Board oversees the E.D. and that the E.D. should not be party to her/his evaluation do not mandate a conclusion that the E.D. should not be on the Board. The inherent conflict does need to be dealt with but precluding the E.D. from serving as a director is only one way of doing so. Conflict of interest issues can be addressed by holding executive sessions of the Board without the E.D. present; for-profit corporations increasingly have sessions to which the CEO (though on the board) is not invited.

2. Pros of Having the E.D. on the Board.

a) Attracting and Retaining an Outstanding E.D. People like status and being on the board is a form of status. I don't think it is happenstance that foundation and museum chief executives tend to be on the boards of the organizations they serve. While some E.D. candidates and E.D.s may not care whether they are on the board, many will. Talent is often accompanied by a substantial level of ego (so is an absence of talent, but presumably the E.D. selection process is focused on finding talent). Thus, being "on the board" may well be a factor in attracting talented applicants for the E.D. position. I believe that board status is increasingly relevant to applicants for E.D. positions and thus is increasingly recommended by search firms in drafting job descriptions for E.D. positions.

While my pal Peter was not concerned about board status (a lack of ego or an abundance of it -- you decide!), I had a distinct preference for being on the board when I became NPCC's E.D. I had been on the board since NPCC's inception in 1984 and somehow did not want to think of myself as no longer a peer of the board members (ego, or not enough ego? -- you decide -- but please not in my presence). The idea that the E.D. was simply "hired help" (a term sometimes used) was not appealing, as I felt responsible for the long-term as well as the short-term well-being of NPCC and felt that board status was consistent with that view, and that status as "hired help" was not.

b) Enhancing the E.D.'s Prestige/Status with Third Parties. In some instances being on the board may help in dealing with funders and others. Also, being on the board may not matter, but not being on the board may matter. In general, however,



the E.D.'s dealings with third parties are probably affected very little by whether she/he is on the board. Most third parties are unlikely to consider the point at all and, if they do, such as by noting that the list of board members in an annual report is followed by a heading saying "Executive Director," they probably give that non-board status little thought. But for some third parties, board member status for the E.D. may be a source of perceived gravitas that is helpful. If, for example, the E.D. is on the board and is alone at the meeting with a funder, it is clear that the E.D. speaks for the board, as well as for the staff, in seeking financial support. Some funders insist that a grant-seeking organization bring a board member to the meeting with the funder to discuss the potential grant. One would think the E.D.'s status as a board member, even if she/he is accompanied by another board member, would be a plus in these situations, i.e., the funder knows that the E.D. carries the fiduciary responsibilities of a board member.

c) Having the E.D. Think Like a Board Member. As noted, the role the E.D. plays in dealing with the board is an important factor in determining the nonprofit's effectiveness.

That role has two elements. First, the E.D., as E.D., is the lead provider of information to the board as to how the nonprofit is faring. Is money coming in as expected? Are programs proceeding as anticipated? Are financial and government and grantmaker reporting matters being properly attended to? These are the objective parameters of the E.D.'s role vis-à-vis the board.

Second, there are subjective parameters of the E.D.'s role that profoundly affect his/her effectiveness. How does the E.D. view the board and how does the board view

the E.D.? Is the E.D. seen by the board, and by the E.D. her/himself, as a hired hand, to be given directives and to see that they are carried out? Or, at the other extreme, is the E.D.'s function in the Board's eyes, and the E.D.'s, as a kind of Supreme Leader -- one who is keeping the nonprofit happily in the Promised Land, to the adulation, and little else, of the board?

My own experience is that this subjective perception of the E.D.'s role -- by the board and the E.D., is more important than whether the E.D. is "on the board." But -- whether the E.D. is, or is not, on the board can affect the board's perception of the E.D. and the E.D.'s own perception of her/himself.

Accordingly, I believe that a nonprofit suffers to the extent that the board gives an E.D. the feeling that she/he is not a peer, and having the E.D. not be on the board may well be an important factor in giving the E.D. this feeling. Peter has told me that U.S. Navy personnel about to end their tours of duty use the phrase "short-termer" to describe themselves. Their sense of responsibility declines as they see themselves no longer responsible for developments down the road. I believe that, to the extent a nonprofit E.D. feels, or is made to feel, like a short-termer, the organization suffers. Those in the Nonprofit Forum who have "made partner" at a law firm will recall that the nagging doubt as to whether they would screw up in the months preceding the partnership decision -- a short-term perspective focused on oneself -- immediately gives way to long-term concerns about the future of the firm as a whole. A long-term perspective is of course the one a board wants an E.D. to have.

d) A Board May Need the CEO on the Board to do a Good Job as a Board.

In my experience, nonprofit boards consist of bright, well-intentioned but busy people for whom the nonprofit is a secondary, or, more likely, a tertiary concern. The reality as I see it is that many boards function mainly to determine that, in general, things at the nonprofit are going OK. (If they are not going OK, then the board's job is much bigger – it needs to consider replacing the E.D.) All of the stories about the inattentiveness of some nonprofit boards tend to support the view that, in those situations, the board is generally doing little beyond keeping a (distracted) eye on the nonprofit to see that it is doing OK. Where this is the case, whether it is doing OK, or not, depends principally on the E.D and not on whether the board has given the E.D. good direction as to what the E.D. should be doing.

The implication of this view is that, particularly in the situations noted in which the board plays a limited role, the E.D. is, or should be, effectively in a board member role -- whether on the board or not -- and may well, in either case, be the most important board member-like person because of what should be her/his intense focus on the long-term prospects of the nonprofit. If that is the case, then it seems clear that the E.D. should presumptively be on the board - - particularly in light of the other pros mentioned above for giving board member status to the E.D.

Finally, it is important to re-acknowledge that, for many nonprofits, having the E.D. not be on the board works just fine -- because the E.D.'s view of her/himself vis-à-vis the board, and the board's view of the E.D., is of a peer, partnership relationship. In those situations, the answer to our question is: "It doesn't matter." But that does not

seem to be a good answer as a governance prescription, in light of the anticipated benefits, noted above, of having the E.D. on the board.

#### IV. Conclusions.

1. There do not appear to be legal constraints to having the E.D. on the board -- with the exception of occasional government contracting rules prohibiting the practice.

2. I do not see good reasons for keeping the E.D. off the board. The conceptual reasons offered -- fear of E.D. domination of the board and the inherent conflict of interest involved in board oversight of the E.D. -- are real concerns but are not tied to having the E.D. on the board. A forceful E.D. can dominate a docile board whether she/he is on it or not and an E.D. on the board can be effectively evaluated by disinterested board members.

3. I see good practical and conceptual reasons for having the E.D. on the board. In essence, I believe that board-member status tends to increase the status and long-term perspective of the E.D. in the eyes of the board, in the E.D.'s own eyes and in the eyes of other relevant parties, such as funders.

4. While for many nonprofits it probably doesn't matter whether the current E.D. is on the board or not, I believe that, as a governance matter, the E.D. should be on the board because she/he should be thinking like a board member and not like a hired hand. Who is (or should be) better able to plan for the long-term success of the organization? If the E.D. is not encouraged to think of her/his job in those terms, a highly valuable resource is lost. In particular, the board needs the E.D.'s help to protect it from failing to take into account important considerations that may be apparent to the E.D. but not to the

board. Of course, an E.D. should bring these considerations to the board's attention whether or not she/he is on the board -- but not being on the board and, especially being treated as hired help, may make the E.D. less likely to do so.

#### V. Further Questions

1. If the E.D. is on the Board, should the E.D. be a voting member? This question is an important one, as it goes to what it really means to be "on the board." I've seen very little addressing it, except for comments to the effect that non-voting status for E.D.s is common and that it is "awkward" for an E.D. to vote against a portion of the board if the board is divided. A BoardSource survey in 2004 (The Nonprofit Governance Index 2004) showed that only 18% of the responding E.D.s voted on their boards; it appears, however, that respondents included E.D.s not on the board, as well as those on the board, and so that 18% figure is apparently not meaningful as to whether E.D.s on their boards normally have voting rights. Interestingly, the trend toward voting rights is upward relative to prior iterations of the BoardSource survey, as only 9% of E.D.'s were reported to be voting members of their boards in the 1999 BoardSource Governance Index survey. (See BoardSource 2004 Governance Index, Executive Summary at [www.boardsource.org](http://www.boardsource.org).) The responses to the NPCC survey noted above can be read, though not conclusively, as suggesting that about 30% of organizations having the E.D. on the board give the E.D. voting rights, a figure generally consistent with the upward trend noted in the 2004 BoardSource survey.

My view is that the E.D. should have a vote because not giving the E.D. a vote tends to move the E.D. from board status to hired hand status. Having a vote is,

ultimately, what being “on the board” is all about and so, if my conclusion to the question posed in the paper is correct, having a vote is effectively a given.

2. Should Legislation Require the E.D. to be on the Board? A final point worthy of consideration, if you accept my view that the E.D. should ordinarily be on the Board, is whether state nonprofit law should require the E.D. to be on the Board. I think not for two reasons. First, given the range of nonprofits, there are presumably many for which special circumstances would make having the E.D. serve on the board not be advisable. Second, there are many very well run, well-led nonprofits that do not have the E.D. on the board, and so a one-size fits all mandate seems inappropriate and potentially counterproductive. In this situation, forcing a governance restructuring – a “fix” where nothing is “broke” – seems like a poor use of time and energy. As noted, where the E.D. enjoys a stature comparable to that of a board member -- a peer/partner relationship -- actual board membership is not necessary. Accordingly, while I believe having the E.D. on the board is best as a general matter, I believe that there are enough exceptions to make it unwise to seek to impose board status as a legal requirement.