

# What's in a Name? "Director" vs. "Trustee"

**O**FTEN TIMES, TITLES ARE USED INTERCHANGEABLY, WITH little thought to whether they are indeed synonymous or actually reflect subtle distinctions (e.g., doctor versus physician, lawyer versus attorney, non-profit versus not-for-profit). So it is with the titles "director" and "trustee."

In the non-profit world, "directors" and "trustees" are often used interchangeably; intended to refer to the group of individuals responsible for the management of the activities and affairs of the corporation (e.g., "board of directors," "board of trustees," "board of governors"). Most state non-profit laws provide a common structure from which these individuals (whether directors, trustees, or governors) may carry out those responsibilities.

Which is the most appropriate title to use? Is there a difference? The general trend is to encourage use of the title "director," as opposed to "trustee," when referring to individuals serving on the governing board of the non-profit corporation. This reflects a series of interrelated concepts:

- "Trustee" may have a separate meaning under state law (e.g., as a person, association, corporation, or other entity holding property for, or solicited for, any charitable purpose such as a trustee of a charitable trust). Many states have charitable trust acts or similar laws, separate and distinct from non-profit corporation acts.
- The fiduciary standards of a trustee under most charitable trust laws are often interpreted as holding the trustee to a higher standard of conduct than that applicable to the director of a non-profit corporation (e.g., liability for acts of simple negligence, as opposed to gross negligence). Furthermore, trustees of charitable trusts are held to an absolute duty of loyalty to the trust and are prohibited from engaging in any self-dealing. Directors of non-profit corporations have a more relaxed duty in this regard and may participate in conflict-of-interest and similar transactions with proper board approval.
- Most state non-profit laws are "corporate law based" as opposed to "trust law based," meaning they are derived from the principles of business

corporation law (and the state business corporation law statute), which applies the title "director."

Simply referring to a board member as a "trustee" as opposed to a "director" should not, in and of itself, automatically convert the duties of board members to the higher trust law standard. Yet, the concern is that by referring to governing board members as "trustees," as opposed to "directors," the non-profit corporation may unintentionally be increasing the board's exposure to trust law arguments. This would especially be the case in states where there exists a potential for application of charitable trust laws to non-profit corporations.

This approach is consistent with many state non-profit corporate law statutes, which use the title "director" rather than "trustee." Furthermore, some states (e.g., Ohio) have made the decision to change by statute how non-profit board members are referred, from "trustee" to "director." Indeed, in these states, the persons responsible for conducting the affairs of the non-profit corporation are regarded by the law as "directors," irrespective of the name (e.g., "trustee") by which they may be referred in the non-profit's organizational documents.

To some, the title "trustee" suggests an aura of greater sophistication and more charitable focus than the title "director," given the latter title's close association with business corporation law. Yet this is not really a fair distinction. Because most state non-profit laws are corporate based, it is more appropriate to refer to governing board members as "directors"—and without any of the unnecessary baggage attributed to charitable trust principles. So, my vote is always for "director" rather than "trustee." There is a distinction *with* a difference! ■

The Governance Institute thanks Michael W. Peregrine, Esq., partner, McDermott Will & Emery, LLP, for contributing this article. He can be reached at [mperegrine@mwe.com](mailto:mperegrine@mwe.com).