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The Nonprofit Board's Duties When Considering a Change of Control

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The recent increase in change of control activity in the nonprofit healthcare sector prompts the need to revisit the governing board's fiduciary duties when considering such transactions. This is particularly the case given state statutes that require board approval for a change of control, several new high-profile dissolutions of previously consummated transactions, and the willingness of state attorneys general to challenge individual transactions for perceived flaws in the review and approval process (for which the board is ultimately responsible).[1] A change of control transaction is a corporate event of such significance that heightened oversight by an informed, disinterested board is both expected and required. Accordingly, corporate counsel may play a valuable role in advising the nonprofit board on its obligations as it evaluates a change of control proposal.

The following discussion seeks to provide a framework for such advice, by discussing the applicable fiduciary duties, to whom they are owed, by whom they are enforced, and how they are satisfied in the context of a change of control transaction. As the term indicates, "change of control" refers to a transaction in which control of the governance of the corporate entity, or of a majority of its assets, is changed.[2] This can occur through a variety of mechanisms, including through an asset sale, merger, consolidation, long term lease, or change of membership (among other models). Our discussion presumes that fiduciary duties must be exercised in the consideration of each of these transactions, regardless of whether the organization is "gaining" or ceding" control over assets.

1.0 THE BASIC DUTIES

Generally accepted common law principles apply the bedrock fiduciary duties of loyalty, care, and obedience to purpose to the board's consideration of a change of control:

1.1 The Duty of Loyalty. This basic duty requires directors to exercise their power and authority in good faith and in the best interests of the corporation and its charitable mission, not in their own personal interests.[3] In the change of control scenario, this means that the director is called upon to evaluate the proposal from the corporation's perspective, and not with respect to its possible effects on the director personally, his/her professional interests, or those of any other organization or entity with which the director may simultaneously maintain a financial or fiduciary relationship. The duty of loyalty encompasses several principal components that have application in the change of control context:

Conflicts of Interest: A conflict of interest does not, by and of itself, constitute a breach of the duty of

loyalty. Rather, directors are obligated to be aware of the potential for such conflicts, to make disclosure of potential conflicts, and otherwise to act with "care and candor" in regard to conflicts.[4]

Confidentiality: Directors are obligated to maintain the confidentiality of information with respect to the legitimate activities of the corporation until such information has been disclosed to the public or is otherwise in the public domain.[5]

1.2 Duty of Obedience to Purpose. This duty provides that the corporation has an obligation to further the charitable purpose of the organization, and to act in conformity with all laws affecting the corporation.[6] It is the first part of this particular duty that has the greatest application to change of control transactions. Directors must evaluate change of control proposals and opportunities from the perspective of the potential implications to the charitable mission.

1.3. The Duty of Care. This duty requires directors to act in an informed, good faith manner when participating in board decisions and in the oversight of management of the corporation, with the care of an "ordinarily prudent person in a like position under similar circumstances."[7] This duty often includes an express obligation of reasonable inquiry and applies both with respect to normal oversight of operational matters, as well as with respect to significant individual matters or transactions (e.g., reviewing and approving significant corporate actions such as change of control transactions, advising management on significant issues or opportunities facing the corporation).

1.4 Business Judgment Rule. Application of the duty of care may, in certain circumstances, be subject to application of the "Business Judgment Rule," which exists to protect and promote the discretion of the board in the management of the affairs of the corporation.[8] This rule is a presumption that in making a business decision, corporate directors acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the corporation. In other words, as long as directors have not violated their fiduciary duties and have engaged in an appropriate deliberative process, a court will not "second guess" their decisions, even those ultimately determined to have been unwise.[9] Thus, the party challenging the board's decision must *rebut* the presumption that the board's business judgment was a good faith exercise of its management authority and not in violation of the applicable fiduciary obligations. The determination of whether a director's business judgment is informed will often turn on the extent to which the directors have conducted a reasonable inquiry in order to inform themselves of all material information reasonably available to them. "Gross negligence" and/or "bad faith" generally is considered the required basis to challenge a board decision that is subject to the Business Judgment Rule.[10]

Boards should be aware, however, that application of the Business Judgment Rule to decisions of a nonprofit board depends on relevant state common law, and it may not be uniformly recognized. Furthermore, some states may impose stricter standards for board review and approval under specific statutes applicable to change of control transactions. This is particularly the case when the review criteria are intended to assure that the board does not exceed or fail to carry out the corporation's charitable purpose.

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1.5 To Whom the Duties Are Owed. Directors of nonprofit corporations owe their fiduciary obligations to the corporation itself—and not to the personal interests of board members, executives, donors, or other private parties.[11] In essence, the fiduciary duties of loyalty, obedience to purpose, and due care, as described above, are intended to ensure that charitable assets are properly managed; that there is not private benefit; and that the charitable mission, as manifested in the corporation's articles of incorporation, bylaws, and historic uses, is carried out.

2.0 WHO ENFORCES THE DUTY

The regulatory agencies exercising primary jurisdiction with respect to the conduct of the governing boards of tax-exempt, nonprofit corporations are primarily the state attorneys general, and the Internal Revenue Service (IRS).

2.1 Attorney General. The attorney general of the state of incorporation (and of those states in which the corporation conducts operations or has sufficient contacts) usually has both statutory and common law authority to oversee the operations of the charitable corporation and ensure that it is operated in a manner consistent with law. Attorneys general have

historically exercised jurisdiction over change of control transactions involving nonprofit healthcare organizations (particularly those involving conversion of assets to for-profit ownership), either pursuant to specific state statutes or regulatory protocol, or common law authority.

2.2 The Internal Revenue Service. The IRS is vitally interested in the governance structure of tax-exempt organizations, and has made the promotion of good governance, management, and accountability a "pillar" of its compliance program for the exempt organization sector.[12] The IRS has continuing concern with "lax" governance practices in the nonprofit sector, and in multiple ways has reflected the view that the well-governed organization is likely to be a tax compliant organization.[13]

This commitment to oversee corporate governance should be considered together with the IRS' long-standing interest in change of control activity involving nonprofit, tax-exempt hospitals, for multiple exempt organization tax reasons. These include the continuing recognition of the nonprofit hospital transaction parties as income tax exempt under Internal Revenue Code (IRC) Section 501(c)(3); the enforcement of prohibitions against private inurement and excess private benefit potentially arising from the transaction; the application of the intermediate sanctions excise tax to certain compensation arrangements and other arrangements potentially arising from the transaction, and the structure and operation of nonprofit foundations created to hold, invest, and disburse proceeds from hospital asset sales.[14]

3.0 SATISFACTION OF THOSE DUTIES

The process by which the nonprofit board evaluates a change of control proposal should be designed to position the directors to satisfy their duties of obedience, loyalty, and care (and the Business Judgment Rule), together with any additional obligations that may be required by state statute or regulation. Specific manifestation of the appropriate standard of care may vary depending upon whether the organization is either gaining control of another corporation, or ceding control of its own assets.

3.1 Duty of Loyalty. Those particular components of the duty of loyalty that should be addressed at the incipiency of proposal discussions include:

Conflicts of Interest: Throughout the change of control process, the board should apply its conflicts of interest policy and be acutely sensitive to any relationships (or the appearance thereof) among its officers and directors that could bias or otherwise inappropriately influence individual decision-making. Particular attention should be placed on potential conflicts arising from (a) physician board members whose individual practices could be impacted by the transaction; (b) directors simultaneously serving as corporate vendors, whose business with the corporation could be at risk; (c) community directors with close business and or social relationships with officers and directors of a potential corporate partner; (d) officers and/or directors who may actually hold an ownership interest in a potential corporate partner; and (e) members of the executive management team who could benefit personally from consummation of the transaction (e.g., from an agreement with the seller outside the ordinary course of business). The board should also be sensitive to conflicts or concerns presented when corporate executives receive (or are entitled to receive) stock options, retention or performance bonuses, loans, or similar executive benefits arising from the consummation of the transaction. Note: some states apply particularly strict conflicts-related rules to board members participating in change of control-related negotiations.[15]

Confidentiality: The existence and particularities of a change of control proposal normally are highly confidential and sensitive. Inadvertent or unauthorized disclosure of proprietary transaction information may undermine a corporation's negotiating leverage and strategic position in the market, as well as create unnecessary and premature distress with corporate constituents (e.g., patients, medical staff members, employees, vendors). Inappropriate disclosure also may subject the corporation to significant financial penalties under a "confidentiality agreement" that may have been executed with a potential transaction partner. As such, it is very important that board members protect confidential corporate information so as not to damage the corporation's interests.

3.2 Obedience to Mission. Directors must evaluate change of control proposals from the perspective of the potential implications to the charitable mission. The board's deliberations must reflect a clear and thorough evaluation of how specific strategic proposals will further the mission of the

organization. The failure to adequately consider strategic mission issues can imperil transactions and provide the state attorney general or other state charity officials with material grounds to challenge the transaction.[16] Indeed, in several prominent instances, state attorneys general have challenged change of control transactions on charitable trust law grounds as being inconsistent with the dominant purpose of the organization, as defined in the "purpose" clause of the articles of incorporation.[17]

While seemingly self-evident, satisfaction of this duty requires an appreciation by the directors of the actual mission of the organization, as articulated in its governing documents. (This may include a brief review of what it means to be a nonprofit, charitable corporation.) It is not meant as a criticism to say that some well-intentioned directors may be less familiar with the full breadth of the charitable mission than they might otherwise be. A carefully considered change of control board review process will begin with a review of the mission, its heritage, and the ability of the organization to further the mission on a going forward basis without change. This would allow for a logical transition to a discussion of strategic, economic, and other factors that might prompt consideration of a change of control as a means of furthering the mission (although, hopefully, the board will be generally familiar with many of those factors).

3.3 Duty of Care/Business Judgment Rule. An important consideration for the board is the appropriate degree of care to be applied in evaluating change of control proposals; i.e., whether the incidence of care is expected to be higher when the board is presented with complex or challenging transactions outside of the ordinary course of business. Delaware courts have held such to be the case—ruling that "special obligations" are imposed on directors in situations involving the sale or transfer of control of a company and that the courts will "apply enhanced scrutiny to ensure that directors have acted reasonably."[18] Attorneys general and other state charity officials are likely to take the same position and contend that a change of control proposal is such an extraordinary circumstance and so outside the ordinary course of business as to require exercise by the board of a higher level of care in connection with its evaluation.

Thus, the duty of care expectation is that the nonprofit directors will exercise an appropriately informed business judgment reflective of such "special obligations" when evaluating a change of control proposal. Whether a decision is indeed "informed" will depend upon the adequacy of the decision-making process; i.e., whether the directors have, before rendering a decision, informed themselves of all information material to the transaction that is reasonably available to them, taking into consideration the significance of the change of control proposal. In a change of control situation, elements of an informed decision might logically include the following:

- The strategic, operational, and mission issues prompting the proposal (i.e., overlap with duty of obedience to mission factors);
- The history of the proposal and how it came to be presented to the corporation and the board;
- Application of specific criteria against which a proposal is to be considered;

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- The fundamental terms and conditions of the transaction;
- The legal requirements by which the transaction (and the board's review thereof) must be structured;
- The financial feasibility of the proposal and related implications;
- The advantages and disadvantages of the proposal as well as the realistic alternatives to achieving the desired strategic, operational, and mission goals; and
- Whether the transaction is in the public interest (e.g., projected impact on access to and quality of care, employees, medical staff, donors, and other constituents).

It is important to note that the Business Judgment Rule does not seek to treat directors as "guarantors" of the success or wisdom of the change of control, but rather allows for leeway and discretion in exercising judgment.[19] In exercising their duty of care responsibilities, directors are entitled to rely on information, reports, and statements prepared by corporate officers, legal counsel, and advisors to the corporation (e.g., specific "valuation," "financial," and "merger/acquisition" advisors).[20] However, reliance is not available in those circumstances where the director has knowledge that would make reliance unwarranted (e.g., a

report contains information a director knows to be inaccurate).[21]

Directors are also authorized to rely upon the recommendation of board committees on which the directors do not serve, as long as the subject is within the committee's designated authority and the directors believe that the committee merits confidence.[22] This is particularly important given the fact that, for reasons of speed, efficiency, confidentiality, or otherwise, many boards evaluate change of control options at least initially through a special committee formed for the purpose of evaluating the proposal. Under this approach, the committee members to whom oversight of the process is delegated are expected to (1) be familiar with the detailed terms of the agreement; (2) periodically report to the board on transaction status; and (3) ultimately to summarize its provisions to the full board for its approval. Both the committee and the full board are entitled to rely on their advisors, particularly legal counsel and strategic and financial/valuation consultants, in understanding definitive agreement terms. Legal counsel may play an important role in preparing document summaries for board review.

While the competence and independent makeup of such committees is a critical component from a reliance perspective, the use of such committees also raises an important question regarding disclosure to, and discussion with, the full board. There may exist legitimate conflicts/confidentiality reasons to limit knowledge of, or involvement in, the initial negotiations concerning the proposal to a standing (e.g., Executive) or special committee. Regardless of the immediate merits of such a delegation, it should be made with the full understanding that the proposal will be shared with the full board at an appropriate time, which would allow the board to render an informed decision based in part on reliance on the committee's report. (This assumes that the law of most states will require full board approval of a change of control transaction.) The longer the committee delays informing, and reporting to the full board, the greater the risk the board will be compromised in its ability to render an informed decision in a timely manner.

3.4 Problem Areas. There is sufficient evidence from judicial decisions, regulatory proceedings, and media coverage to provide helpful examples of duty of care-problematic director conduct in change of control transactions. These include (but are not limited to) the following:

- Failure to consider mission factors in any aspect of the board's decision-making process;
- Failure to consider alternatives to the proposed transaction;
- Failure to provide board/committee members with adequate information in a timely manner to allow for an informed decision;
- Failure to involve the full board in the decision-making process;
- Failure of the board to commit time and energy to render an informed decision (e.g., failure to familiarize itself with the relevant terms and conditions of proposals and definitive agreement terms);
- Reliance on assumptions that the board knew (or had reason to know) were inaccurate or unreliable;
- Unwarranted/inappropriate reliance on, or deference to, executive management and/or outside advisor/failure to exercise "constructive skepticism";
- Use of a selection criterion for bidders that benefited management or was non-responsive to mission interests;
- Structuring an otherwise "flawed" auction process for the assets; and
- Absence of a written record (e.g., board/committee minutes) that reflects the board's deliberative process.

An additional important consideration is the extent to which the nonprofit board may consider non-cash factors in negotiating and consummating a change of control transaction.

4.0 FOR-PROFIT ALTERNATIVES: SPECIAL FACTORS

A change of control transaction potentially involving a for-profit purchaser requires additional director diligence and inquiry because of unique legal issues posed by (a) the conversion to for-profit use of assets originally dedicated for nonprofit ownership; (b) the transfer of assets from an IRC tax-exempt entity to for-profit

ownership; and (c) the need for proper allocation of any proceeds from sale. *In addition to* the general duty of care factors identified at Section 3.3 above, the directors should consider the following additional factors, among others, when presented with a conversion proposal. Information considered material to rendering a decision on a change of control proposal for the corporation might logically include (but would not be limited to) the following:

4.1 Conversion Plan. Development of an approach to the transaction that satisfies the hospital's charitable purpose. This would include (1) confirmation of the provisions of any state conversion statute and of the organization's charter, particularly as they relate to both the fundamental authority to convert assets to for-profit ownership and director standards of conduct for such transactions; and (2) preparation of an appropriate charitable uses spending plan, to address the application of the proceeds from sale.

4.2 Evaluation. Ability to appropriately distinguish between offers from nonprofit and from for-profit partners, and their relative advantages and disadvantages. This might include a preliminary due diligence-related examination of their respective operational and financial performing histories.

4.3 Advisors. (a) Retention of qualified advisors with experience in structuring a process designed to elicit interest from the broadest applicable section of the healthcare sector and, (b) access to, and appreciation of, the advice provided by the advisors.

4.4 Market Process. The board must be committed to a change of control process that allows market forces to work freely, not to impermissibly favor one bidder over another in the establishment of any auction or "market clear" process, and to render an informed, disinterested decision with respect to selection of a change of control partner. Retention of a qualified advisor to help structure this process may be of significant importance.

4.5 Fair Market Value. The board's duty of care will obligate it to assure that fair market value is received for corporate assets. This may involve retention of an experienced valuation advisor (particularly a firm concentrating its practice in the healthcare industry). Subject to conflict of interest considerations, this could be the same advisor that helps structure the "market clear." An inability to convince regulatory authorities of the receipt of fair market value in exchange for the conveyed assets may place the board at risk of personal liability. While valuation reports and fairness opinions may speak to general concepts of value, regulators will likely take the perspective that "the market" is the best measure of asset value.

4.6 Conflicts Management. The board should assure the thorough application of the corporation's conflicts of interest policy to the change of control process. This is particularly the case given the complexities of the change of control process, the magnitude of dollars involved, and the number of participants. Specific focus would be made to assure that no director is enriching himself/herself at the corporation's expense; senior management who is advising the board on the process is not receiving financial advantages from the transfer; and the external advisors retained by the board in connection with the transaction do not conduct material business with any of the prospective partners (unless such conflict is expressly waived).

5.0 REVLON CONSIDERATIONS

An additional important consideration is the extent to which the nonprofit board may consider non-cash factors in negotiating and consummating a change of control transaction. Case law in the public company sector provides that when negotiating change of control transactions, the board must conduct a "market check" and accept the change of control proposal that offers the highest value. The board is thus responsible for "the maximization of the company's value at a sale for the stockholder's benefit" (this is the so-called *Revlon* standard).[23]

Of course, many nonprofit change of control transaction processes are structured only to involve other nonprofit organizations in which no assets go out of charitable trust and in which *Revlon* duties appear clearly inapplicable. Other such processes may involve multiple offers from nonprofit and for-profit purchasers alike, with some offers received at or in excess of the independently determined fair market value of the assets. Furthermore, in many nonprofit change of control transactions, the nonprofit board is motivated to achieve certain mission-related objectives. As such, the board may wish to accept certain forms of non-cash consideration, such as capital improvement commitments, quality and access to acute care commitments, preservation of workforce, and preservation of employee benefits, which are consistent with the charitable mission yet may reduce the ultimate purchase price.

As noted, it is without question that nonprofit boards must satisfy "fair value," and "fair market value" requirements for transactions involving a sale of assets to a for-profit entity (most likely through a market clear or auction process), as described above. This does not mean, however, that nonprofit corporations must satisfy the *Revlon* standard in every instance. The authors are unaware of any reported decision in which any court has applied the *Revlon* standard to nonprofit charitable corporations. To require otherwise could significantly limit the flexibility of the nonprofit in structuring a change of control consistent with mission goals. Indeed, it appears that valid legal and policy reasons exist to distinguish nonprofit corporations from their for-profit counterparts in this regard, particularly when non-cash consideration is offered (from either for-profit or nonprofit entities) and is deemed of material value to preserve or promote the nonprofit's charitable mission, or when other legitimate factors are present.

When the nonprofit board is presented with several offers reasonably close in value that satisfy "fair value" requirements, the nonprofit board should *not* be required to accept the highest cash offer to the exclusion of other offers that include non-cash elements that provide material benefits relating to mission. Non-cash factors that reflect a concern for the best interests of the corporation and its charitable mission should be an appropriate consideration by the board. In addition to the mission-related factors identified above, other non-cash factors might include the structure of the proposed or actual financing for the offer, and the consequences of that financing; the financial strength and corporate integrity of the putative purchaser; and the experience of the putative purchaser in serving the healthcare consumer needs, and its particular post-closing plans for the market.

In other words, nonprofit directors should be entitled to exercise their business judgment by conducting a fair and unbiased process, carefully considering all of the relevant factors (including, among others, the dollar amount of competing offers, the terms and conditions of those offers, and the non-price considerations). Assuming that is done, and absent self interest or bad faith, it appears to the authors that the Business Judgment Rule should apply. Nevertheless, given certain controversy on the topic, corporate counsel should be mindful of the issue.[24]

6.0 CONCLUSION

Regulators will view the nonprofit healthcare board's evaluation of change of control options as requiring a high degree of diligence, loyalty, and care. A descriptive "snapshot" of the appropriate standard of care in such circumstances was provided by the Tennessee courts in evaluating such a transaction:

> The members of the boards themselves devoted substantial time, energy and effort to analyzing, pondering and considering the ramifications of the proposed sale. They thought about their constituents, about the implications of not selling the hospital's assets, about a sale to others, about such options such as networking, about continuing to stand alone, and other alternatives, and the affects upon the members of the public who utilize the hospital and the community itself. They reflected upon the consequences to the patients, the employees, the businesses in the community which encourage or direct employees to utilize the hospital, and to the continued availability of primary care and specialized physicians for the community.[25]

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END NOTES

1 *See, e.g.,* "Attorney General's Decision on Proposed Sale of Anaheim Memorial Hospital," *available at* http://ag.ca.gov/ charities/pdf/ AAMC_letter.pdf#ml=http://search.doj.ca.gov:8004/AGSearch/isysquery/983-64eb-4415-892a-6d83fbd076e6/3/ hilite/; *Health Alliance of Greater Cincinnati v. Christ Hosp.,* No. A0601969 (Ohio Ct. Com. Pl. Apr. 14, 2007); *Bob Mook, Exempla, Sisters of Charity Battle Widens Boundaries,* Denver Bus. J., January 28, 2008; *see also Manhattan Eye, Ear & Throat Hosp. v. Spitzer,* 186 Misc. 2d 126 (1999); *Health Midwest v. Kline,* No. 02-CV-08043 (Dist. Ct. Johnson County Kan. Feb. 4, 2003).

2 "Change of Control" is sometimes specifically defined as (a) a transaction resulting in a change of more than 50% of the persons who possess the

power to elect or approve the board of directors; (b) the sale, lease, or other disposition to another corporation of all or substantially all of the assets of the corporation; or (c) the merger, member substitution, consolidation or reorganization of the corporation with or into another corporation as a result of which the corporation is not the surviving entity and does not possess the right to elect at least 50% of the governing body of such entity.

3 GUIDEBOOK FOR DIRECTORS OF NONPROFIT CORPORATIONS, SECOND ED., American Bar Association Committee on Nonprofit Corporations (Overton and Frey, Editors), p. 29.

4 *Id.* at p. 30.

5 *Id.* at p. 34.

6 Peregrine and Schwartz, *The Application of Nonprofit Corporation Law to Health-Care Organizations,* American Health Lawyers Association (2002), p. 40-41.

7 AMERICAN BAR ASSOCIATION, REVISED MODEL NONPROFIT CORPORATION ACT (1987) § 8.30.

8 *Id.* at cmt. 3. *See also, Beard v. Achenbach Mem'l Hosp.*, 170 F.2d 859, 860 (10th Cir. 1948).

9 AMERICAN LAW INSTITUTE, 1 PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01(c) (1994). *See Aronson v Lewis,* 473 A.2d 805, 812-13 (Del. 1984); *Aronson* 473.2d at 812; Peregrine & Schwartz, *The Business Judgment Rule and Other Protections for the Conduct of Not-for-Profit Directors,* 33 J. HEALTH L. 422, 466 (2000).

10 *Smith v. Van Gorkom,* 488 A.2d 858, 873 (Del. 1985).

11 AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS, Tentative Draft No. 1 (March 19, 2007).

12 Remarks of Steven T. Miller, Commissioner, Tax Exempt and Government Entities, Internal Revenue Service, October 22, 2007, *available at* www.irs.gov/pub/irs-tege/stm_isector_10_22_07.pdf and November 10, 2007, *available at* www.irs.gov/pub/irs-tege/stm_speech_—_philantoropy_ roundtablestm1107.pdf, collectively, "Miller Remarks."

13 *Id.*

14 *See* www.irs.gov/pub/irstege/eotopicp96.pdf.

15 *See, e.g.,* CAL. HEALTH & SAFETY CODE § 1260, 1260.1 (2007), provisions that prohibit board members who participate in negotiation of a sale or transfer of assets of a nonprofit hospital to a for-profit purchaser from receiving any form of remuneration from that purchaser.

16 Most recently, mission issues related to the proposed "unwind" of a joint operating agreement became the subject of an attorney general opinion (*see, e.g.,* finding of Attorney General John W. Suthers, *In the Matter of the Exempla Healthcare System Membership Transfer, available at* www.ago.state.co.us/press_releases/ExemplaFinal.pdf.)

17 *See, e.g., Manhattan Eye, Ear & Throat Hosp. v. Spitzer,* 186 Misc. 2d 126 (1999).

18 *See e.g., Paramount Communications v. QVC Network,* 637 A.2d 34 (Del. 1994); *Omnicare, Inc. v. NCS Healthcare, Inc.* 818 A.2d 914 (Del. 2003); *Upper Deck v. Topps Co.* (In re Topps Co. Shareholders Litigation), 926 A.2d 58 (Del. Ch. 2007).

19 REVISED MODEL NONPROFIT CORPORATION ACT, *supra* note 7, § 8.30 cmt. 2.

20 Daniel L. Kurtz, BOARD LIABILITY: GUIDE FOR NONPROFIT DIRECTORS, 27-29 (1st Ed., Moyer Bell Ltd. 1988).

21 REVISED MODEL NONPROFIT CORPORATION ACT, *supra* note 7, § 8.30(b), cmt. 7.

22 GUIDEBOOK, *supra* note 3, p. 50.

23 *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,* 506 A.2d 173 (Del. 1986).

24 *See generally* Peregrine and Schwartz, *Revisiting the Duty of Care of the Nonprofit Director,* 36 J. OF HEALTH L. 196-200 (2003).

25 *Tennessee ex rel. Adventist Health Care Sys./Sunbelt Health Care v. Nashville Mem'l Hosp.,* 914 S.W.2d 903 (Tenn. Ct. App. 1995).

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