

THE JOB IS NO JOKE

Orchestra boards must act responsibly. If boards cause their ensemble to fail, they must pay the consequences...

SEVERAL YEARS AGO I was asked by a former client to join the board of a nonprofit social service agency she had created. The agency's primary goal was assisting new immigrants to become acclimated and integrated into life in the United States. Another former client of mine served as chair of this nonprofit and we all got along fabulously. The fateful words uttered by my former client, the founder and CEO of this agency, still ring in my ears: "IT WILL BE FUN!"

Joining this board presented itself as an ideal opportunity to me. The objective of the agency was certainly a laudable one and joining would give me a chance to participate in public service. I ardently believe that attorneys (and other professionals) should give back to their clients and community.

Well, within the two years I served as an active member of the board, I lived to regret the decision. No, it was not fun at all. Within that time period, hours and hours spent developing strategic plans were all for naught due to an internal squabble as to the proper direction the agency should take. I resigned as an active member of the board after the agency imploded. Lesson learned.

Anyone who considers joining a nonprofit board must realize that doing so engenders a significant and substantial obligation – and one that has considerable exposure to legal liability as well.



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After reading Tom Olcott's article in the November issue titled "When orchestra boards fail us," I began to wonder why people join symphony orchestra boards in the first place. When they first joined, did they have any idea what they were committing to and how important their responsibilities were? How did the opportunity first present itself to them? Did they seek out the board position or did it simply fall into their lap? From my own experiences serving on a nonprofit board, the failure or success

of an orchestra hinges on the answers to these questions. If an individual joins an orchestra board for prestige or simply because it sounds like fun, they are doing a disservice to the institution. In my mind, the paramount goal of an orchestra board must be nurturing, preserving and ultimately promoting the excellence of the orchestra. Once having achieved excellence, they are duty bound to preserve it.

This is no different than what we would all expect of a cultural institution entrusted with the care and preservation of priceless works of art. Having come into possession of such artwork, board members must now preserve it for future generations. The same is true for symphony orchestras.

However, I would venture to guess that board members are rare who understand the importance of their function and role. Further, it is even rarer for board members to suffer any consequences in the event that they cause an orchestra to fail.

However, legal consequences do exist. Under the New York "Not-for-Profit Law," officers and directors of a nonprofit have an obligation to exercise the degree of care, skill and diligence that an "ordinarily prudent person" in their position would exercise. This standard means that directors and officers of nonprofit boards are actually "fiduciaries"

(trustees) who are required to act prudently, responsibly and in the best interests of the nonprofit they preside over. If they fail to do so, the state attorney general has the ability to seek a fiscal remedy against the board under section 112 of the state Not-for-Profit Corporation Law (N-PCL).

For instance, in 2007 the New York state attorney general sued the members of the board of the New Dance Group Art Center (NDGAC) for fiduciary breach because the board had engaged in actions against the best interests of the NDGAC. *Spitzer v. Schussel*, 17 Misc.3d 1120 (A) (S. Ct. 2007). The allegations in the suit stated that the board had failed to monitor the director, who had irresponsibly invested and lost assets of the company. The complaint against the board also alleged egregious examples of self-dealing and graft. For instance the director lived rent-free in a building leased by the dance company and used assets owned by the dance company for his own personal benefit.

While this litigation presents an extreme example of fiduciary breach, it still represents an occasion when the state attorney general decided to bring suit against a nonprofit board involved in an artistic endeavor. It stands as an important precedent that may provide the basis for future litigation. The circumstances that might lead the attor-



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ney general to bring additional suits against a nonprofit board remain a mystery and may be determined by the political vagaries of the day. However, it might serve the public well if the attorney general's office were more involved in investigating the recent failures of nonprofit boards such as the recent catastrophe at New York City Opera.

Admittedly, it may be far-fetched to believe that the attorney general's office will decide to step into the fray when a symphony orchestra has failed. Given our current economic climate, it is understandable that it will be difficult at best to prove a fiduciary breach claim against a nonprofit board.

Perhaps what is needed is the formulation of another legal standard for nonprofit boards. As Kevin Case recently suggested in his Case Arts Law article "Fiduciary Failings: The Case Against Reckless Symphony Orchestra Boards," the boards of arts organizations should be obligated to abide by the artistic mission of their organization. Just as there should be repercussions against museum boards who recklessly or negligently destroy a priceless work of art in their care, there should be repercussions against orchestra boards who either negligently or intentionally destroy the very orchestra they were charged with preserving.

'BEING PAID TO MAKE MUSIC'

A FREE WORKSHOP FOR MUSICIANS

- Have you ever wondered which is better: to be paid "off the books" – or instead to have taxes deducted from your paycheck?
- Have you ever filed for unemployment or workers' comp and your claim was denied because you were deemed an independent contractor? How does the "employee" vs. "independent contractor" classification work? How do you assert your rights to be classified as an employee?
- Have you ever applied for benefits or housing and were turned down because you couldn't document your earnings?
- Have you ever needed to create a contract for a gig, but didn't know where to turn for help?

Learn the answers to these questions and much more, and find out how Local 802 is addressing the needs of all musicians.

The free workshop will run from 11 to 3 on Wednesday, Jan. 29, and is open to both members and non-members of Local 802

For more information, e-mail Siena Shundi at MAP@Local802afm.org. If you are a Local 802 member, please include your membership number.

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Are you a member of Local 802 who is planning a free public concert? Have you budgeted all the costs for this concert but could use the help of a grant? The Music Performance Trust Fund is here to help. Currently the MPTF is offering 30 percent of total costs to musicians performing single engagement concerts under the public service scales and rules of the MPTF. The application process has been simplified and funds are available to members of Local 802. MPTF rules apply and all applications must be completed and submitted 45 days in advance of a concert date. Applications are subject to approval.

For more information and to apply, please contact Roy Blum at Rblum@Local802afm.org or (212) 245-4802, ext. 150.



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