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Midwestern Shame Spirals - Transcript

[Speaker 1]

Welcome to Charity Therapy, the podcast where we explore the ups and downs of the non-profit sector and answer your burning questions. I'm your host, Jess Birken, owner of Birken Law Office, and I'm excited you're here. Imagine hanging out with me and my super smart, funny non-profit expert pals.

You get to ask them anything about your nitty-gritty non-profit life and get their wisdom for free. Whether you're a seasoned pro or just strapping on your non-profit boots, we're here to share stories and remind you you're not alone on this journey, so get ready to join the conversation and bring me the tough question.

I ain't scared. Ready to rock? Let's dive in.

[Speaker 2]

Hello, and welcome to this episode of Charity Therapy. For our long-time listeners, this episode might sound a little familiar. Today, we are re-airing our conversation about conflicts of interest from a few years back.

We get so many questions about conflicts, so we decided it was a good time to brush off the dust and spruce up this episode just for you. I hope you enjoy.

[Speaker 1]

Hey, Meghan, how's it going?

[Speaker 2]

I'm doing well, Jess. How are you?

[Speaker 1]

You know, I'm good. I've got this whole concussion thing going, so I hired.

[Speaker 2]

Never-ending.

[Speaker 1]

I know, right? Don't hit your head repeatedly, people. I don't recommend it.

[Speaker 2]

Not good for you.

[Speaker 1]

It's not, and because it's not, I hired a housecleaning service.

[Speaker 2]

That's awesome.

[Speaker 1]

They're like totes here right now, and it's like any time the housecleaning people are here, I have this terrible like Midwestern shame spirals because as a Midwesterner, I feel like horrible that other people are cleaning for me, and I should be helping them. It's like a crazy cultural thing.

[Speaker 2]

Oh, it's absolute instinct, though, of like, no, you can't, you know, do this. I must help. I can't just sit here.

[Speaker 1]

Doesn't matter that I need the help. I should be helping you.

[Speaker 2]

You don't have to. I'm glad you're not, Jess.

[Speaker 1]

Thank you, Meghan.

[Speaker 2]

Okay, so today, I have another job for you. You're going to talk to me about conflicts of interest.

[Speaker 1]

Yes, ma'am. I'm ready to help. Here we go.

[Speaker 2]

Yeah, so before we get into the questions, first, Jess, please tell us, what actually is a conflict of interest, and how does it work in the nonprofit world?

[Speaker 1]

Yeah, so this is one of those things that like a lot of people seem to misunderstand, and, you know, I'll try and sum it up, but a lot of people are just like, that's a conflict. Like, I had lunch with a client, a board member from a client organization a couple of days ago, and she was like, well, I think we can have lunch, and it's not a conflict because I'll be resigning soon. And I was like, it's not a conflict, even if you're still on the board. Like, what?

[Speaker 2]

Yeah, what do you think that word means?

[Speaker 1]

Yeah, so conflict is a situation where a person's loyalties are divided, and maybe there's a financial interest involved, and or.

In the nonprofit world, this usually comes up when we're talking about a person serving on the board, or a key staff person, like a CFO or an executive director. It could be a non-key staff, could be somebody else at the organization, but typically, it's coming up for those higher-up people. And these folks have fiduciary duties, and they're legally obligated to make decisions that are in the best interest of the nonprofit, and not in their best interest, or their family's best interest, or their nephew's best interest.

So, like, an example of how this comes up, say, the board wants to hire a web designer to redo the nonprofit's website, and the president of the board, their husband, has a website design company, and they're like, oh, hey, we should hire, you know, my husband's company. Well, that's a conflict, because their household is going to financially benefit from the nonprofit hiring their spouse. So in this situation, the president has a conflict, and yes, that spouse's web design firm can put in a bid to do the project, but the president would personally benefit, their household would personally benefit financially from choosing the spouse's company, so they would need to recuse themselves from the discussion.

And this is where people go wrong. People think, that means we can't hire the president's husband's firm. That's a conflict.

Yes, it is a conflict, but conflicts are not, like, inherently evil and must be avoided at all costs. We can avoid them, but we can also just handle them, and how we handle them is the more important thing in a lot of cases. So in the example with this web design company, the president's husband might be the best candidate.

They might be the most qualified to do the work. They might know the mission because of the president's involvement, or they've done volunteer work, or they might be offering a very cheap competitive rate because they know and love this nonprofit group. There could be good reasons that it would be in the best interest of the organization for the board to hire the president's firm, but the big deal is the president can't be in the room for that discussion.

She can't be there, or he can't be there, like, lobbying for this choice to be made, right? So they need to step out, step away from the process, and they certainly cannot vote on the decision. And as long as all that is documented and we followed our conflicts policy, IRS is pretty cool with that.

Now, we might have to report some sort of, depending on the situation, we might have additional reporting to do on our 990, and we may want to avoid doing that, so we may just not go that route. That's a different math, right? The conflict can exist and can be handled in a lot of situations, and so it's not that the conflict exists that's the problem.

That's the only thing I want to clear up.

[Speaker 2]

I just feel like conflict is such a dirty word, so it's good to just be like, this is going to happen. You just have to know how to handle it when it does.

[Speaker 1]

Somebody says there's a conflict of interest, and the law and order, like, dung-dung sound comes on. It's this big deal, you know?

[Speaker 2]

All right. So you're ready for the first question?

[Speaker 1]

Yes. Let's do it. All right.

[Speaker 2]

A member of my board came into some money and would now like to make a large donation to another non-profit, not our group. Only problem, our organization has given grants to this other non-profit in the past, and we probably will again. Does this donation create conflict for us or for the other non-profits somehow?

[Speaker 1]

Okay. This is an easy one. No, it shouldn't cause a problem.

What I love about this question is there's a spectrum of people that are kind of in the realm here. On one side of the spectrum, you have people who think they can just get away with murder, commit tax fraud, abuse non-profits. And then on the other side of the spectrum, you have the extremely cautious, overly nervous, everything's probably illegal, like, oh, my God, we can't do anything or ever get anything done.

And it's like, oh, this one's on that, trending towards that end of the spectrum. Let's just break it down. The board member of their organization came into some money.

That's their personal issue. Good for them. Board members can make donations to other charities as much as they want.

I used to work at Pheasants Forever, right? How many people that work there also donate to Ducks Unlimited? A lot or whatever.

The Turkey Foundation or the Elks or whatever. You name a conservation organization, I'm sure somebody at PF has donated to it. You can see how that would happen in certain mission areas, right?

So you're really involved in alleviating hunger. You're probably going to donate to a bunch of hunger-related charities. And gee, golly whiz, maybe they've all worked together and done some collaborative thing or helped each other out.

No problem here. It's great that your board member is so committed to supporting the mission and your non-profit's work and that they're giving their own money to the community in this way. It's not a conflict for your organization just because your organization funded that non-profit for something one time in a previous era.

Who cares? Nice work recruiting board members that give and care about the mission work and the area that you're in. I think that's the end of this.

No big deal.

[Speaker 2]

It's never that easy. You've got to love when the answer is just like, you're fine. Okay, next question.

I'm involved in volunteering with a small non-profit that's been around for about five years. They currently have a board with three members and all three of the board members also hold paid part-time staff positions for the non-profit. They're the executive director, the development director, and the finance director.

Recently, they started recruiting for a few more board members and they approached me. I'm hesitant about this setup. What policies or things should be in place to show that everything is on the up and up here?

[Speaker 1]

Okay, this is a juicy one. I would be hesitant also. We definitely have a conflict of interest here.

And also, just on top of that, generally, it's just not a great idea to have board members also be paid staff. And it's also generally not a great idea to have all of your board members also be paid staff. So definitely some red flag material here.

Let's break it down. All right, so in a small non-profit like this, the board and or the executive director, who in this case is also on the board, is making hiring decisions. So they're deciding what positions should exist, who to hire, how much to pay them, determining executive compensation.

And that means this board is effectively choosing their own salaries. Unless they can document that each of them recused themselves and went through some sort of job application, I don't even know how that would work. But it's just obviously there's some issues here that would require some extreme maneuvering to deal with in any way that might resemble legal ethical operations.

Plus, since there's only three people on the board, it's entirely possible they are all three voting on their own salaries. So that's also a no-no if that's what happened. I don't know that's what's happened but...

[Speaker 2]

I mean, if there's only three of them and one of them recuses, it's like if there's a disagreement, we're stuck. You're right. You know, it's like there's only two people left. So it's like it's hard to have any tiebreakers in that scenario.

[Speaker 1]

Yeah. And you can kind of imagine that meeting like they all decided they should all have jobs and then they all like voted on each other or something like I'd like to see those meeting minutes. So okay, let's keep breaking it down.

Technically, not illegal for a board member to also be paid staff. There are cases where you have an executive director who also has a voting seat on the board. I don't recommend that.

It's not illegal in Minnesota. But it's not really a great idea. The board like hires and fires the ED.

They review their performance. It's just kind of a weird situation. And I typically advise against this as just a general rule.

In this case, it's definitely going to be a problem that it leads to confusion. And this is why I advise against this. Because what is the board members work?

And what is the paid staff position work? How are you keeping track of the different roles? And when exactly are you wearing your board hat?

And when are you not? It matters because in nonprofits, board members should not be paid for their board service because it destroys their limited liability. Statutorily in Minnesota and other states, the state gives you immunity as a volunteer.

Once you're not a volunteer, you're opening yourself up to personal liability even more, right? And then just to go a little deeper on this. And in this case, with this question with those job titles, which were executive director, gee, that sounds like a president.

Finance director, gee, that sounds like a treasurer. Development director, that sounds like the one board member who gets to do the fundraising because they're good at it. It's just, okay, did you actually just decide that you wanted to be paid for your board service?

So you just made yourself part-time employees? Because that would be a problem. And regardless, with those officer titles, they're always acting as a fiduciary in both roles, as a staff person and a board member.

And it just wouldn't be a overlap between the finance director and the treasurer, right? And so if I'm being cynical, it just sounds very scammy. It's very suspicious on paper.

And if I were this person being asked to join this board, here's what I would want to know, okay? I would want their insurance coverage policies with the deck sheets. I would want to see their filed articles and their bylaws and know that those bylaws are adopted, not just some like Word document that like they've circulated as maybe this applies to us, but we haven't really done anything about it.

Their actual bylaws. I'd want to see their, at least their last three 990s, which you can just pull from the internet. You don't even need to ask for those.

I'd want to see copies of their financial statements simply for the fact that I want to know if they can generate a financial statement. You should be able to just click a couple of buttons in your QuickBooks and puke out a balance sheet and income statement, no problem. If they can't

do that, okay, so now we've got this other situation where they're like running all the books on an Excel sheet and Lord knows what else is going on, right?

And then I want to see the last two years of meeting minutes, which ideally includes the meeting minutes where those positions were created and voted on. And if they like don't want to show you that, or they claim they don't have good records, or they just can't like be like, yep, that's a reasonable request for a person doing their due diligence before they join our board, I would probably run away screaming. I just wouldn't get involved because there's just too many red flags here, and there's too many conflicts.

[Speaker 2]

Right. It's like if they can't establish that they're doing things right in every other capacity, who's to say that we should give them the benefit of the doubt here?

[Speaker 1]

Yeah. And I'm not saying like go in and be a jerk and be like, this is the board police, and I'm here to investigate you before I join this. That's not the approach.

If you're actually interested in being involved at this level, it's okay to say I'm so honored to be invited. It's a lot of legal responsibility to be a fiduciary. I would love to be able to consider this properly.

Could you send me a Dropbox link or Google Docs link to see these documents so I can take a look at how the organization is run? You can do that in a way that's very not aggressive and just seems like you're a responsible adult that wants to be a good board member. That's what I would do.

[Speaker 2]

Which is your real motivation here. It's like if you can't get that stuff and really assess the situation, you might not be able to be a responsible good board member in that situation. That's all you can do to move forward with your best foot.

All right. So that wraps up our questions. So Jess, what are our takeaways here for this one?

[Speaker 1]

Well, I think one is, learn what a conflict is and don't just bandy about the expression, right? That's always a good one. Yeah.

I mean, conflicts are a fact of life. They can't be completely avoided and they're not evil. So just make sure you're prepared for them.

Learn what they actually are and what you're supposed to do with them. Have a good conflicts of interest policy. And for boards out there, don't get creative.

If people think you're being sketchy, maybe you are. Sometimes it's just ignorance and it was well-intentioned and it's just wrong. But if people are saying this seems sketchy to me, you need to take a hard look in the mirror and get some legal advice to see if you actually are acting in a way that people think is sketchy.

So, yeah, don't get too creative with your strategies. Meghan, you got any for this one?

[Speaker 2]

I think that about wraps it up.

[Speaker 1]

Yeah. Just be careful. Be careful and do that due diligence for the boards you join. That's another good one. Meghan, thanks for being here as always. Appreciate you.

[Speaker 2]

Thanks for having me.

[Speaker 1]

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Thanks for listening.

About the Author



Hi, I'm Jess Birken.

I'm the owner of Birken Law Office, I help nonprofits solve problems so they can quit worrying and get back to what matters most – The Mission. I'm not like most attorneys, I actually have an outgoing personality, and – like you – I like to think outside the box. Most of my clients are passionate and have an entrepreneurial spirit. I'm like that too. My goal is to help you crush it. Getting bogged down in the minutia sucks the joy out of the important stuff. My clients want to do the work – not the paperwork.

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