

# STARTING A NONPROFIT: WHAT YOU NEED TO KNOW

University of Richmond School of Law  
Nonprofit Organizations  
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## **DISCLAIMER**

The information contained in this manual is for general guidance on matters pertaining to the start-up and running of a nonprofit organization. The application and impact of laws can vary widely based on the specific states and situations involved. For the purposes of this manual, we have relied on the law of Virginia, so it is important to consider that other states may have different regulations or guidelines. Given the changing nature of laws, rules and regulations, and the inherent hazards of electronic communication, there may be delays, omissions or inaccuracies in information contained in this manual.

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## CHAPTER 1: BEFORE YOU BEGIN

*What kind of services should you provide? Who will you serve?*

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## I. Before You Begin: A Checklist

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- \_\_\_\_\_ Research community demographics to discover the population's size and needs.
- \_\_\_\_\_ Identify area competitors and/or organizations for possible collaboration to make sure the services your nonprofit will provide are not already offered.
- \_\_\_\_\_ Based on the needs assessment and market analysis, determine what your organization will provide and exactly what group or population you will serve.
  - \_\_\_\_\_ Identify the geographic area you want to serve.
  - \_\_\_\_\_ Identify community stakeholders.
  - \_\_\_\_\_ Identify sources for potential board members and begin recruiting.
- \_\_\_\_\_ Draft your organization's mission statement.

## II. Introduction: Determining the Who, What, and Where of Your Organization

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Before laying the groundwork for your nonprofit organization, you must first determine who you will serve, exactly what services you should offer, and where your organization will be located. These factors will help you to determine your organization's purpose and will eventually lead to your mission statement.

To arrive at your organization's specific mission and purpose, you should first identify the precise needs of the community where you plan to serve. This will involve research at both the macro and micro level. You can accomplish this objective by conducting a needs assessment and market analysis of your chosen community: determining the size of your population, collecting local and community socio-economic data and characteristics, identifying and conducting focus groups of stakeholders in the community, and identifying potential resources for fundraising and for collaboration. You will also want to make sure that the services that you hope to offer and the needs that you hope to meet are not already satisfied by an existing organization or community group.

Knowing the precise needs of your target community will augment several stages of your planning process. It will help you to identify your exact constituents and stakeholders and the available resources in the community that will help get your nonprofit off the ground. It will also help you to arrive at the mission and purpose of the organization.

Identifying stakeholders will serve as a guide when you pursue volunteer and financial resources, and the data that you have previously collected will help you to sell your mission, emphasizing the need for these services in the community. You will emerge from this stage of the process

more familiar with your community, more focused and better able to market your mission to potential stakeholders and philanthropists in the community.

### **A. Community Demographics**

Basic demographic research will reveal whether the community is large enough to sustain your nonprofit, with the necessary financial and volunteer support and a sufficient constituency base. Depending on what kind of nonprofit services you plan to offer, you will need to locate specific socio-economic data and statistics such as age, race, education, income and poverty level, in order to make sure that the *perceived* need for your nonprofit in that community is also an *actual* need. This information will help fine-tune your purpose as you come to better understand make-up of the community's population. It may also reveal additional needs to consider when determining the services you will offer.

Basic demographic data is available on the Internet at the United States Census Bureau web site (<http://www.census.gov>; <http://quickfacts.census.gov/qfd/index.html>) and at your chosen community's local government web. Additional resources for basic and comparative demographic information include a database of census and demographic data compiled by Mansfield University (<http://lib.mansfield.edu/census.html>) and the United States Census Bureau's County and City Data Book, which is also available on the web (<http://www.census.gov/prod/www/ccdb.html>).

In addition to the basic demographic data necessary to complete your needs assessment, you might choose to look to areas outside of the immediate area in which your nonprofit will be located. For instance, you should determine whether persons might travel from surrounding areas to take advantage of your services, whether it will be worth performing outreach to surrounding areas, and whether or not a facility located in your community brings in outside persons that may benefit from your services. If your nonprofit is the only one of its kind, your organization may consider reaching out to surrounding areas to publicize the availability of the services while increasing your funding base.

### **B. Community Organizations for Competition or Collaboration**

If there is not a group or organization currently fulfilling a need within the community, then the formation of a nonprofit to meet that need is a worthwhile objective. If another organization already fills the needs that you hope to fill, there may not be enough resources or a large enough constituency base to sustain a new nonprofit.

If there is already a similar group currently fulfilling the need in the community, collaboration with that group may be the best way to proceed. The existing nonprofit may want to expand into a new area or they may know of another need in the community not yet met by a nonprofit. Partnering with other organizations will allow you to more effectively meet the needs of the community and the clients while avoiding competition for resources. While the possibility of partnering with another organization that serves the same type of clients could be a viable possibility, you should carefully consider how the missions of both groups fit together and whether the groups are truly compatible.

One way to find groups or nonprofits in the community that may be partners or competitors is through an Internet search. Local government or community web sites often contain lists of local nonprofits which serve the area. The local phone book is also a simple resource for locating the nonprofits currently serving an area's needs. Of course, if you live in a particular area, word of mouth is an option for discovering what needs are already met and which types of needs are unfilled in an area. If you find that community needs are already met or you find an organization for possible collaboration, this may either completely change or further focus the type of nonprofit which you hope to form.

### **C. The Geographic Area**

When choosing a geographic area for a nonprofit organization, you must be sure that the population is large enough to support the mission of the organization. A geographic area may be a neighborhood, city, county or greater metro area. It must contain a sufficient base for both board members to serve in the organization and for a pool of clients who need services.

A geographic area may grow or change with time as the client base grows or concentrates into identifiable areas. A nonprofit organization should be aware of the areas from which its clients are coming and should adjust its location if necessary to better serve its clients. For example, if all of the clients that a nonprofit serves are in the downtown area and the nonprofit is out in the suburbs, then the nonprofit should consider a more convenient location.

### **D. The Stakeholders**

When developing a nonprofit, you should seek out individuals, potential donors, foundations, and other community groups that can work collaboratively with the new organization. These stakeholders are necessary for the development and maintenance of the newly formed organization. They provide a source for labor, funding, and referrals.

In order to identify stakeholders, you should first contact organizations in related fields. You can locate these organizations through internet searches using any web-based search engine and by contacting the local United Way. Organizations in related fields will be a great source of information about community efforts and practices. They may also provide referrals to other organizations, individuals, or foundations that will be useful in the formation of an organization.

Each contact will lead to additional contacts until the entire web of related organizations is unveiled. After you contact all of the related organizations and obtain information about their missions, you can get a feel for which of them will be likely stakeholders in the new organization.

Major employers in the geographic area will also be stakeholders. Some of their employees may use the resources of the nonprofit while some of the management personnel may be board members or contributors. The type of jobs offered by these employers may also provide insight into the economic status of the residents and the benefits that they may be lacking.

## **E. Sources for Board Members and Volunteers**

You should recruit board members from the pool of stakeholders and from prominent members of the community or the geographic area in which the organization will be located. The board members will be legally responsible for the organization and must be willing to give their time to the organization and to abide by its bylaws. They must also be aware of their legal duties of care and loyalty and must be careful to abide by them.<sup>1</sup>

You may also need to recruit volunteers, which you might locate through board members, stakeholders, civic organizations, churches, schools, the business community and other nonprofit organizations. You should be sure to inform volunteers about their legal duty to the organization and about their potential liabilities.<sup>2</sup>

The composition of the Board during the start-up of a nonprofit is often determined by those with personal involvement in the mission of the organization. As the nonprofit begins to examine the task of recruiting and selecting board members, you must first determine who in the community has expertise in the mission of the nonprofit. As the identification of potential board members progresses, however, you should also remember the functions of the board of directors and make sure that those recruited are willing and able to fulfill these functions. The duties, obligations, and liabilities of board members are explained in greater detail in chapters four and five below.

There are as many ways to recruit board members. The following are ideas that you might consider:

1. Form a "One-Meeting Nominating Committee": Draw up a list of twenty well-connected people of the sort you would want on the board who you suspect wouldn't join, but who might know someone who would be a good board member. Call those twenty people and ask them to come to a one-meeting committee over lunch. Tell them that at the lunch they'll be told more about the organization and what it's looking for in board members. At the end of lunch they'll be asked simply for the name of one person they think would be a good board member. The day after the lunch call up each of the nominees and begin by explaining who nominated them.
2. Take out a "Help Wanted–Volunteer Board Member" Ad: Take out a help-wanted ad in the neighborhood newsletter or alumni newsletter of a local college. Example: "HELP SOUTH PARK... We're looking for a few talented and conscientious volunteer board members to help us guide our childcare, teen, and senior programs into the next century. If you can contribute one evening a month and have skills or contacts in accounting, publicity or special event fundraising, call Sister Mary Margaret at xxx-xxxx to find out more about whether this volunteer opportunity is right for you. We're a..."
3. Recruit Your Volunteers: Ask the executive director or the volunteer coordinator if there are two or three hands-on volunteers who would make good board members.

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<sup>1</sup> See page 20 of this Manual for explanation of duty of care and duty of loyalty.

<sup>2</sup> See page 65 of this Manual for discussion on volunteer liabilities.



Hands-on volunteers, such as support group facilitators, practical life support volunteers, meal preparers, weekend tree-planters, classroom aides and others bring both demonstrated commitment AND an intimate knowledge of the organization's strengths and weaknesses. Volunteers, donors and clients should be the first place you look. You don't have to "sell" the agency – they know it already!

4. Look to Other Local Organizations: Pick four local organizations where you don't know anyone, but you'd like to (examples: NAACP, Japanese American Citizens League, Accountants for the Public Interest). Tip: Your local Yahoo site (<http://www.yahoo.com>) is a good place to look for lists under "Community." Ask each officer to call one of the four local organizations and ask to have coffee with the board president or the executive director. Over coffee suggest that your two organizations recommend "retiring" board members to each other as a way of establishing organizational links and strengthening ties among communities.<sup>3</sup>

Often the direction and success of a nonprofit is dependent upon the board of directors. While each nonprofit will provide unique challenges and opportunities to involve talented and committed individuals, the selection of the board is a matter of careful planning, coordination of efforts, personal influence and persuasion skills. Marketing your mission is just as important as you recruit board members as when you fundraise or when you try to "sell" your services to potential constituents.

For a sample needs assessment and market analysis, see Appendix, Chapter 1.  
[Appendixchapter1](#)

### **III. The Mission Statement**

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The mission statement should be the culmination of your needs assessment and market analysis. It should quickly and concisely explain a nonprofit's mission to the public and to potential board members and volunteers. It should remain a reference point for the board members, staff and volunteers so that they can constantly keep the purpose of the organization in mind.

Many individuals should participate in the creation of a mission statement, including the organization's founders, board members and stakeholders, and you should elicit criticism and feedback so that all aspects and connotations of the statement are considered before it is finalized. The creation of the mission statement may be a long and arduous process that spans a lengthy time period.

The mission statement is a way to not only advertise and market the mission of the organization to the public, but it can also be used as a tool to find financial support. One of the main purposes of the mission statement besides grounding and focusing the organization is to allow the board

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<sup>3</sup> [www.boardcafe.org](http://www.boardcafe.org). BOARD CAFÉ, The Electronic Newsletter Exclusively for Members of Nonprofit Boards of Directors, June 9, 1998. Vol 2, No. 6. Editor: Jan Masaoka ( a menu of ideas, information, opinion, news, and resources to help board members give and get the most out of board service). Published by CompassPoint Nonprofit Services, in partnership with the Volunteer Consulting Group.

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members and volunteers to quickly convey the purpose of the organization to potential donors or new volunteers.

The mission statement should include both a short one-sentence statement that is easily remembered and memorized and another longer version with more detail. The short statement should be a quick and concise tag line for the organization, while the longer description of the purpose should include more specifics. It should be reviewed and revised during strategic planning sessions as changing conditions cause the organization to move in a new direction or to add new services to its purpose.

Other resources for creating a mission statement:

“How to write a mission statement”

<http://www.tgci.com/magazine/98fall/mission.asp>

“Mission Statement”

<http://www.businessplans.org/Mission.html>

“What should our mission statement say?”

<http://www.nonprofits.org/npofaq/03/21.html>

For sample mission statements, see Mission Statement, Appendix Chapter 1.  
[appendixMissionStatement](#)

## CHAPTER 2: FORMING THE ORGANIZATION

*Should you incorporate? What steps do you need to take to form a organization?*

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## I. Forming the Organization: A Checklist

\_\_\_\_\_ Choose the form of your organization

- Organization
- Unincorporated association
- Trust

\_\_\_\_\_ Draft the *Articles of Incorporation* (assuming that your nonprofit has chosen to incorporate)

\_\_\_\_\_ Submit your Articles and appropriate fee to the State Corporation Commission or similar agency

\_\_\_\_\_ Plan your Board's structure and operation

- Consider the nonprofit's mission and purpose
- Determine the criteria and selection for members of the Board
- Discuss the care and feeding of the Board
- Consider leadership positions and officers of the Board
- Address the business operations of the Board

\_\_\_\_\_ Draft your *Bylaws*

\_\_\_\_\_ Maintain corporate status

- Pay all fees assessed by the State Corporation Commission ("SCC")
- File annual reports with the SCC
- Retain a registered office and agent
- Do not submit a Certificate of Dissolution

## II. Articles of Incorporation

### A. Why Incorporate?

Once you're ready to form your nonprofit entity, the first choice that you need to make is what *type* of entity to form. The three basic forms are corporations, unincorporated associations, and charitable trusts. All three types may apply for and receive tax-exempt status from the Internal Revenue Service ("IRS").

The primary advantage of an unincorporated association is that state law requires fewer formalities in terms of organization, reporting, and registration. Once the nonprofit applies for tax-exempt status, however, the IRS still requires the nonprofit to submit a Form 1023 application, along with formal documentation of the nonprofit's operations.

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One main disadvantage of an unincorporated association is that the members may be held personally liable for operations and actions of the association. In contrast, the members and directors of a nonprofit *corporation* are protected from personal liability. For this reason, the corporate form is often the most desirable organizational form for a nonprofit.

Once you decide to form a nonprofit *corporation*, you must comply with the requirements of the state in which your organization will be located. Most states, including Virginia, have enacted laws specifically addressing the incorporation of a nonprofit. In Virginia, nonprofit corporations are governed by the Virginia Nonstock Corporation Act, Va. Code Ann. § 13.1-801 *et seq.* The following discussion will focus on the provisions of the Virginia statutes; it is imperative that you consult the statutes for the state in which your particular nonprofit will be incorporated.

### B. Articles of Incorporation

The most important part of the incorporation process is drafting the Articles of Incorporation (the “Articles”). These serve as the defining document for your corporation, listing the nonprofit’s purpose and the main aspects of organization and governance. State code lists certain mandatory and optional provisions to be included in the Articles. *See* Va. Code Ann. § 13.1-819. When drafting the Articles, you should include less rather than more, including only what is formally required by statute. The nonprofit, in contrast to a for-profit corporation, must include in its Articles certain provisions that the IRS requires for tax-exempt status.

Beyond these requirements, you should address the majority of a nonprofit’s operational matters in the nonprofit’s Bylaws, which you will be able to amend more easily. Amending the Articles, requires filing changes with the state, along with a filing fee, while amendments to the Bylaws can take place within the corporation.

Once you have drafted your Articles, the process of incorporation is completed by the incorporator or incorporators. *See* Va. Code Ann. §§ 13.1-804, 13.1-818. The incorporator will be the person who files the Articles of Incorporation with the appropriate state agency. In Virginia, the Articles are filed with the Clerk of the State Corporation Commission (“SCC”) and must comply with the filing requirements of § 13.1-804. The charter and filing fee for incorporation is \$75.00. The contact information is as follows:

Office of the Clerk  
State Corporation Commission  
Post Office Box 1197  
Richmond, Virginia 23218-1197

Tel: (804) 371-9733  
Website: [www.scc.virginia.gov](http://www.scc.virginia.gov)

The SCC sample form for Articles for a Non-Stock Corporation is Form SCC819, *available at* <http://www.scc.gov/division/clk/forms/scc819.pdf>. When the nonprofit officially becomes a corporation, the incorporator(s) are the persons responsible for appointing directors.

***Mandatory Provisions***

Under Va. Code Ann. § 13.1-819, the following provisions *must* be included in a nonprofit's Articles (§ 13.1-819(A)):

1. The Corporate Name – the individuals forming the nonprofit should choose the corporate name. The corporate name must meet the requirements of § 13.1-829, which specifies, among other things, that the name of the corporation may not contain any word or phrase which indicates or implies that it is organized for the purpose of conducting any business other than a business which it is authorized to conduct. The nonprofit should also have “back-up” names in case the first name is already taken. A call to the Clerk's office at the SCC can confirm whether a name is available.

Reservation of Corporate Name – prior to incorporating, the nonprofit may reserve a corporate name for 120 days and may renew such reservation for successive 120-day periods under § 13.1-830. For the appropriate form to reserve a corporate name, *see* Form SCC631, *available at* <http://www.scc.virginia.gov/division/clk/forms/scc631.pdf>.

2. Members – if the nonprofit will not have any members, the Articles *must* contain a statement to that effect. If the nonprofit is to have one or more classes of members, the Articles *may* include a provision designating the class or classes of members, stating the qualifications and rights of the members of each class and conferring, limiting, or denying the right to vote. Alternatively, the Articles *may* provide that membership provisions will be in the nonprofit's Bylaws. It is preferable only to include in the Articles the minimum information regarding membership that is required by statute and to include additional membership considerations in the nonprofit's Bylaws, since the Bylaws may be more easily amended.

Whether you choose to make your nonprofit corporation a member versus non-member corporation will depend on your goals and purposes for formation. If you form your nonprofit primarily to benefit a distinct group of individuals (i.e. prospective members), a membership corporation is preferable. In a membership corporation, persons or entities who qualify as members will provide the nonprofit with financial support, staff, and/or often public support for the nonprofit. In turn, members may have a vote regarding certain corporate governance matters, including the approval of board members and certain reorganizations or alterations of the mission.

Alternatively, if a nonprofit is formed primarily for the goal of achieving a mission that does not directly benefit members, membership is not as critical. For many such nonprofits, the time and cost of supporting a membership may be more of a burden than an advantage. Furthermore, members will generally be allowed a certain level of control, which will take away some of the decision-making authority of the board.

3. Directors – if the directors of the nonprofit are not to be elected or appointed by one or more classes of members, a statement of the manner in which such directors shall be elected or

appointed, and a designation of ex officio directors, if any, must be included in the Articles. *See* Va. Code Ann. § 13.1-855.

4. Registered Agent and Office – the registered agent is the person designated by the nonprofit corporation upon whom process against the nonprofit may be served. Under Virginia law, the Articles must state the address of the nonprofit’s initial registered office, including both (i) the post-office address with street and number, if any, and (ii) the name of the city or county in which it is located. The Articles must also state the name of its initial registered agent at that office, and that the agent is either (i) an individual who is a resident of Virginia and either a director of the corporation or a member of the Virginia State Bar, or (ii) a domestic or foreign stock or nonstock corporation, limited liability corporation or registered limited liability partnership authorized to transact business in Virginia. The nonprofit may not act as its own registered agent, and the individual designated as registered agent must meet one of the above statutory qualifications.
  - a. Often, the Virginia attorney assisting the nonprofit with incorporation may be willing to serve as registered agent.
  - b. If the registered agent’s qualification is that of an initial director, then the names and addresses of all the initial directors must be included in the Articles. A corporation can have directors immediately upon formation only if they are named in the Articles.
  - c. If a nonprofit later decides to change the registered agent, it is an easy process. *See* Form SCC636, *available at* <http://www.scc.virignia.gov/division/clk/forms/scc636.pdf>.
5. Incorporator – Under Va. Code Ann. § 13.1-818, one or more persons may act as incorporator. The incorporator signs and files the Articles with the SCC. Typically the incorporator only serves as such until the first meeting of the nonprofit following incorporation, at which time directors and officers are elected and/or appointed.

### ***Optional Provisions***

The following elements *may* be included in the Articles (§ 13.1-819(B)):

1. Directors – the names and addresses of the persons who are to serve as the initial directors of the nonprofit. If the directors are not named in the Articles, the incorporator appoints the initial directors in a separate document after incorporation.
2. Other Provisions, Not Inconsistent with Law – the Articles may include any provision not inconsistent with law, including corporate purposes, management and regulation of the nonprofit, powers of the nonprofit, directors and members, and any provision required or permitted to be set forth in the Bylaws.
  - a. Purpose and Powers. Although under the Virginia statute, the Articles are not required to state a purpose, they must state the purpose if you seek federal tax-exempt status under I.R.C. § 501(c)(3). There are two tests that a nonprofit must meet in order to qualify for

tax-exempt status under § 501(c)(3): the organizational test and the operational test.<sup>4</sup> The organizational test requires that the Articles limit the nonprofit to one or more exempt purposes.

The nonprofit's purpose(s) in the Articles may be as broad as, or more specific than, the purposes listed in § 501(c)(3). It is advisable to draft the purpose as broadly as possible to allow the nonprofit to adapt in the future to changes in the nonprofit or to changing needs in the community, without the formality and expense of filing amendments to the Articles.

The purpose of a nonprofit as stated in the Articles is broader than its mission statement. When drafting the purpose clause, it is advisable to follow the sample purpose provision as set forth in IRS Publication 557.

The operational test looks at whether the nonprofit is being “operated exclusively” for one or more exempt purposes. This test does not focus on the Articles.

In Virginia, nonprofits have the general power to carry on their business, and the broad range of powers listed in § 13.1-826, unless the Articles provide otherwise.

- b. Limitations – for tax-exempt approval, the Articles must also specifically prohibit certain activities such as inurement of benefits to individual members; the intervention of the nonprofit in political campaigns or substantial lobbying; and a general prohibition on any activities that would prevent the nonprofit from obtaining, or cause the nonprofit to lose, IRS tax-exempt status. Again, IRS Publication 557 provides a helpful sample provision for these limitations.
- c. Dissolution – the Articles must also include a specific dissolution provision requiring distribution of assets to another § 501(c)(3) entity, the federal government, or to a state or local government, for public purposes upon dissolution. A sample dissolution provision is set forth in IRS Publication 557.

For sample Articles of Incorporation, see Appendix, Chapter 2 [articlesofincorporation](#)

### **III. Maintenance of Corporate Status**

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Unless the Articles of Incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business.<sup>5</sup> A nonprofit corporation must fulfill specific administrative requirements to maintain that corporate status, which are laid out in state law.

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<sup>4</sup> MARILYN E. PHELAN, NONPROFIT ENTERPRISES: ORGANIZATIONS, TRUSTS, AND ASSOCIATION §§ 8:02–8:04 (2000).

<sup>5</sup> VA. CODE ANN. § 13.1-826.



In general, a corporation will retain its corporate existence if it does not exceed or abuse its authority to carry on business by carrying out illegal activities.<sup>6</sup> Along with fulfilling taxation filing requirements to be discussed in the next chapter, a corporation authorized to transact business will remain in good standing in Virginia if it: (a) pays all fees assessed by the State Corporation Commission (SCC); (b) files an Annual Report; (c) retains a Registered Office or Agent; and (d) does not submit a Certificate of Dissolution.<sup>7</sup>

## **A. Payments**

A corporation authorized to transact business must submit payment to the SCC for all fees, fines, penalties and interest assessed, imposed, charged or to be collected as required by the SCC.

A corporation must pay fees for:

1. Charter and entrance;<sup>8</sup>
2. Filing documents or issuing certificates;<sup>9</sup>
3. Annual registration;<sup>10</sup>
4. SCC information and response;<sup>11</sup> and
5. Miscellaneous charges.<sup>12</sup>

You should take special note regarding the payment of fees for annual registration. If your corporation fails to file the Annual Report in a timely manner, the SCC will mail a notice of that they are about to terminate its corporate existence. Whether or not such notice is mailed, if your corporation fails to file the annual report before a final date, the corporate existence of such corporation automatically ends as of that day, and its properties and affairs will pass automatically to its directors as trustees in liquidation.<sup>13</sup>

A corporation should also review the specific statutes concerning the assessment of fees and charges by the SCC.<sup>14</sup>

## **B. Annual Report**

A corporation authorized to transact business must file and deliver an Annual Report with the SCC which sets forth:<sup>15</sup>

1. The name of the corporation, the address of its principal office and the state or country under whose laws it is incorporated;

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<sup>6</sup> VA. CODE ANN. § 13.1-915.

<sup>7</sup> VA. CODE ANN. § 13.1-809, 915.

<sup>8</sup> VA. CODE ANN. § 13.1-815.1.

<sup>9</sup> VA. CODE ANN. § 13.1-816.

<sup>10</sup> VA. CODE ANN. § 13.1-36.1; Va. Code Ann. § 13.1-914.

<sup>11</sup> VA. CODE ANN. § 13.1-21.1.

<sup>12</sup> VA. CODE ANN. § 13.1-21.2.

<sup>13</sup> VA. CODE ANN. § 13.1-914.

<sup>14</sup> VA. CODE ANN. § 13.1-815.

<sup>15</sup> VA. CODE ANN. § 13.1-936.

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2. The address of the registered office of the corporation (including both (i) the post office address with street and number, if any, and (ii) the name of the county or city in which it is located), and the name of its registered agent at such address; and
3. The names and post-office addresses of the directors and the principal officers of the corporation.

You must file this report on forms furnished by the SCC, supplying the information as of the date of the report.

Except as otherwise provided, the Annual Report of a domestic or foreign corporation must be filed with the SCC before the day that is one year from the day that you incorporated or were first authorized to transact business in the local State, and by such date every year. You must file this report no earlier than three months prior to its due date each year. If the report appears to be incomplete or inaccurate, the SCC will return it for correction or explanation. Otherwise, the SCC will file it in the clerk's office.

At the discretion of the SCC, the Annual Report due date for a corporation may be extended, on a monthly basis, for a period of no more than eleven months, at the request of your corporation's registered agent of record. You should also review the specific State statutes regarding regulations for procedural requirements for filing an Annual Report.<sup>16</sup>

### **C. Registered Office or Agent**

In order to transact business, your corporation must retain a Registered Office or Agent. The Registered Agent of a corporation is the corporation's agent for service of process, notice, or demand should your corporation be involved in a legal proceeding. The Registered Agent can designate other persons who can accept service if they do so in writing, in front of a notary public. Whenever this person accepts service of process, a photographic copy of this instrument should be attached to the return.<sup>17</sup>

A Registered Office may be the same as any of its places of business.<sup>18</sup>

The sole duty of the Registered Agent is to forward to the corporation at its last known address any process, notice or demand that is served on the registered agent. The Registered Agent may be an individual or a corporation<sup>19</sup>

A corporation should review the specific State statutes regarding regulations for change or resignation of the Registered Office or Agent.<sup>20</sup>

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<sup>16</sup> VA. CODE ANN. § 13.1-936.

<sup>17</sup> VA. CODE ANN. § 13.1-836.

<sup>18</sup> VA. CODE ANN. § 13.1-833.

<sup>19</sup> See page 15 of the Manual for further discussion of who is eligible to be the Registered Agent.

<sup>20</sup> VA. CODE ANN. § 13.1-834, 835.

## **D. Dissolution**

A corporation authorized to transact business may terminate its corporate existence by submitting a Certificate of Dissolution or may be terminated by the SCC.

Either directors or members of the entity may dissolve the corporation. A dissolved corporation continues its corporate existence but may not transact any business except to wind up and liquidate its business, including: (1) collecting its assets; (2) disposing of its properties; (3) discharging or making provision for discharging its liabilities; (4) distributing its remaining property; and (5) doing every other act necessary to wind up and liquidate its business.<sup>21</sup>

A corporation should review the specific State statutes regarding regulations for procedural requirements for dissolution.<sup>22</sup>

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## **IV. Drafting Bylaws**

In addition to the articles of incorporation, a nonprofit corporation must file a governing document, such as the bylaws, in order to secure tax-exempt status. The bylaws and articles of incorporation are filed at the same time, but the bylaws outline internal governance structure and operations of the board. The bylaws may be general enough to allow some degree of flexibility and yet specific enough to serve as a guiding document concerning the responsibilities, structure, and operations of the Board of Directors.

Bylaws are necessary in order to determine which staff and board members have authority and decision-making responsibilities and how those responsibilities should be carried out. They create a framework for the corporation which aids in resolving internal disputes and ensures that financial resources are used properly. Page 17 of the Appendix provides sample bylaws for a nonprofit corporation. Below, is a checklist walks through the basic considerations and decision points involved with crafting bylaws.

## **V. Structure and Operations of the Board of Directors**

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The function of the Board of Directors is to carry out the mission of the corporation. The structure of the Bylaws outlines the parameters under which the Board operates. When determining the structure of a Board of Directors for a nonprofit corporation, you should keep in mind that the ultimate goal is to assess: “What is needed to facilitate both active participation and effective decision making?”

Note that the structure of the Board may change as the organization matures. The way in which the Board is structured and the way in which it operates should be spelled out in the bylaws of

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<sup>21</sup> VA. CODE ANN. § 13.1-906.

<sup>22</sup> VA. CODE ANN. § 13.1-902-917.

the corporation. The section below walks through a number of considerations for determining the structure and operations of the Board.

## **A. General Board Types and Obligations**

### ***Types of Boards***

- **Governing Board**

The governing Board makes decisions about the policies and operations of the corporation. The governing Board has a responsibility to tend to the legal, financial, operational and human resources functions.

- **Advisory Board**

An advisory Board extends the outreach of the organization to engage community leaders and to seek their “expert” guidance on matters affecting the organization. An advisory Board or committee may have specific skills which equip them to provide consulting, ideas, and suggestions. Advisory committees may offer advice but do not set policy. The organization may accept or reject the advice offered.

### ***Obligations of the Board***

Individuals who serve on boards must understand that they are bound by two primary duties: the *Duty of Care* and the *Duty of Loyalty*.

The Duty of Care requires Board members to act (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interests of the corporation.

The Duty of Loyalty requires Board members to pursue the corporation’s best interest, whether over money or politics. The Duty of Loyalty prohibits a director from engaging in self-dealing unless there is full disclosure to the Board and the transaction is clearly in the corporation’s best interest.

Other Duties – if an organization is young, it may not have the financial resources to commit to hiring staff to support the operations. Unless the Board is able to recruit a cadre of volunteers to function in staff roles, the Board members of a young organization may also have to serve as workers.

## B. Structure of the Board<sup>23</sup>

### *Size of the Board*

- Large board (More than 21 members)
- Mid-size board (Up to 21 members)
- Small board (Up to 12 members)

When an organization is incorporated, it must list the names and addresses of the persons who are to serve as the initial directors. If the directors are not named in the Articles, the incorporator may appoint the initial directors in a separate document after incorporation.

An corporation in its formative stages may be guided by as few as three individuals. However, as stated earlier, the Board of Directors has a responsibility to tend to the legal, financial, operational and human resources functions. A larger governing Board would enable the corporation to benefit from a broader set of skills. When the organization matures, its operations are likely to become more complex. In order to afford the organization the flexibility that it needs to grow, it is recommended that the bylaws provide an acceptable *range* for the number of directors. The organization will need to set the upper limit for the ideal number of directors, taking into consideration the various functions and committees that will be needed to support the governance of the organization.

### *Tenure and Terms of Board Membership*

- Structure and rotation of terms

It is helpful to stagger terms so that 1/3 of the board members are beginning their terms, 1/3 are ending terms, and 1/3 remain. Under this structure, the length of a single term should be divisible by three. For example, three years of service would be defined as a single term. Staggered terms allow for new board members to be mentored as they learn the organization and to become fully immersed in the board operations. It is difficult for organizational development if too many board members are new. On the other hand, a board may become stagnant if the same individuals serve year after year.

- Term limits

It is customary to specify the number of terms a board member may serve. Often, the recommended number of terms is two or three. Term limits help to manage the health of the board. Term limits can be a helpful recruiting tool in order to attract new board members. Potential board members will want to consider the length of the commitment before accepting the responsibility to serve on the Board. If term limits do not exist, a Board can

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<sup>23</sup> Brown, William A., “Exploring the Association between Board and Organizational Performance in Nonprofit Organizations”, Center for Nonprofit Leadership & Management, January 5, 2004.

become stagnant or complacent. Term limits provide a graceful exit by those whose interests may have waned.

If a board member is truly engaged and wants to remain active, then there are at least two options. First, designate a length of time that a board member remains off the board after which time the individual may be eligible once again for a full rotation of service. Second, an emeritus board may be created. An emeritus board provides a way to engage former board members by keeping them apprised of organizational activities and/or inviting them to attend the annual meeting of the Board.

## **C. Composition and Selection of the Board<sup>24</sup>**

You should always take care when it comes to selecting new board members, particularly when selecting the early board members who will lay the groundwork for future boards. If the Board regularly evaluates its own performance, then the Board will have a clear idea about what skill sets are needed to round out the composition of the Board. The skill sets required may shift as a corporation moves from the forming stage to the operational stage, growth stage, and maturity.

### **1. Composition**

Below is a listing of considerations to ensure a diverse board:

- Demographic Distribution
  - Gender
  - Race
  - Age
- Geographic Distribution
- Representative Stakeholders
- Skill sets
  - Business
  - Communications
  - Educational
  - Financial
  - Fundraising
  - Human Resources
  - Professional: legal, medical, psychological, religious, technical
  - Programmatic
  - Public Relations

Two other factors may help to shape the composition of the board. These factors are the stage of the development of the organization and whether or not the organization is in a position to hire

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<sup>24</sup> [www.governance.com.au](http://www.governance.com.au), Nonprofit Governance & Management Centre, “Strengthening Board Effectiveness”

employees to carry out its operations. Together, these factors will help to identify the skills needed to govern the organization.

a. Stage of development of the organization

- Start-up
- Growth
- Mature

The skill sets required to steward an organization may be very different for a mature organization compared to a start-up organization or an organization in the growth stages. For example, a start-up organization may require board members to be more “hands-on” in the daily operations of the organization, especially if professional staff is not available. As discussed earlier, the creation of staggered terms and term limits enables the organization to bring in the new skills it needs.

b. Role of Professional Staff vs. Board

As mentioned above, whether or not professional staff is available may influence the skills and time commitment required of board members to run the organization. If professional staff is available, then the board needs to identify which, if any, are also members of the board and whether or not they have voting rights.

Does the organization employ professional staff?

No

Will the board chairman also serve as the executive director of the organization? Is there an opportunity for other volunteers or staff members to attend board or committee meetings on a periodic basis? How many volunteers will you need and what roles will they serve? Do the volunteers have job descriptions?

Yes

Will the paid executive director be a voting member of the board? What staff members will regularly attend meetings? Is there an opportunity for other volunteers to attend board or committee meetings on a periodic basis?

The decision to hire professional staff depends almost exclusively on the financial resources available to the nonprofit organization. Nonprofit organizations are formed with a wide range of access to financial resources. The decision to hire professional staff should not be taken lightly. In the formative stages of a organization, it may be highly likely that the organization is fully staffed by volunteers who may or may not also be members of the board. Volunteer staffing has its advantages and disadvantages. The opportunity to hire part-time or full-time staff allows the board to delegate many of the administrative functions.

## **2. Selection Process for New Board Members**

- Research: Resume & Application
- Interview

Your organization should clearly outline the process to provide for the nomination, review, and final selection of board members. Many boards require an application form and or resume as part of the nominations process. Others require a personal interview so that board candidates may meet with staff and board members in a small setting prior to accepting their role on the board. This kind of care and attention to the selection of the board member conveys the significance that is placed on the role of the board.

## **3. Board Development**

### **a. Orientation and Training**

- Orientation: individual or group
- Briefing packets
- New board member mentors
- On-going training of board members

A strong orientation program will send a signal to new board members that they are critical players on the team.<sup>25</sup> The board member should be fully briefed about the organization's history, goals and operations. The new board member should be provided with a number of documents such as the (1) mission statement of the organization, (2) Articles of Incorporation, (3) Bylaws, (4) most recent annual report, (5) financial statements including the budget and tax filings of form 990, (6) policies, (7) expectations for meeting attendance and committee work, and (8) a list of current board members with complete contact information and committee designations

### **b. Training**

Training new board members and integrating them into the organization is another important process. Training can take several forms. Training can focus on developing particular skills or training may be an on-going education concerning the operations of the organization through presentations by volunteers or staff.

### **c. Board Annual Self Evaluation**

The organization may want to survey the members of the board on a yearly basis in order to evaluate board member engagement, strengths and weaknesses. It is recommended that a written questionnaire be used to as a tool to collect information about various aspects of the board.

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<sup>25</sup> [www.governance.com.au](http://www.governance.com.au), Nonprofit Governance & Management Centre, "Strengthening Board Effectiveness"



d. Board Retreats<sup>26</sup>

Retreats occur outside of the regular schedule of board meetings. Retreats may occur on an annual basis or they may be held on a periodic basis to address long-range topics. Retreats may or may not be facilitated by paid consultants. Retreats provide an opportunity for nurturing relationships among board members and building board cohesion.

**D. Business Operations of the Board<sup>27</sup>**

The business of the board includes executive responsibilities, finance, personnel, program, nominations, resource development/fundraising, public information/media, and planning and evaluation.<sup>28</sup> Often boards conduct their business through standing committees that meet outside of the regularly scheduled board meetings. Committees meet to conduct business or make recommendations on policy issues within their areas of responsibility. However, ad hoc committees may be appointed with a specific charge and deadline to achieve results.

***Meetings***

- Frequency
- Regular vs. Special vs. Committee

Meetings are the principal means through which board carry out their legal responsibilities.<sup>29</sup> Therefore, it is important to spell out the expectations for meeting attendance in the bylaws of the organization.

***Leadership and Officers<sup>30</sup>***

1. Officers

- President
- President-Elect
- Immediate Past President
- Secretary
- Treasurer

The officers of the organization are to carry out core responsibilities which are essential to fulfilling the governance role.

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<sup>26</sup> Futter, Victor Nonprofit Governance and Management, “Board Retreats” pp. 229 – 232. American Society of Corporate Secretaries, 2002.

<sup>27</sup> “A Guide for Board Members of Nonprofit Organizations”, United Way of the Capital Area

<sup>28</sup> [www.mosaica.org/prinples.htm](http://www.mosaica.org/prinples.htm) “Operating Principles for Boards of Directors of Nonprofit Organizations: an Overview.”

<sup>29</sup> IBID

<sup>30</sup> Module 7 “Board Duties and Responsibilities: Clarifying Job Descriptions”. Clemson University Extension and South Carolina Association of Nonprofit Organizations, 2002.

## 2. Other Leadership

Committee Chairs often serve as part of an executive committee meeting with the officers.

### **E. Committees**

- Standing Committees
- Ad hoc Committees

The Board of Directors may want to appoint standing committees to carry out specific functions. For example, a curriculum committee of an independent school would be responsible for attending to the curriculum and making adjustments as deemed necessary. A young organization may not have depth of the board to appoint a number of distinct standing committees. In this case, an audit committee and a nominating/board development committee are suggested as the minimum committees required. The Board of Directors may appoint ad hoc committees to carry out specific functions such as an anniversary committee. The board should consider whether or not non-board members may serve on standing and/or ad hoc committees.

### **F. Communication**

- Meetings
- Conference calls
- Written reports
- E-mails

The Board of Directors will want to outline acceptable methods of communication. May meeting notices and minutes be distributed via e-mail or must they be sent through the postal service? How will committees report their activities to the full board? If a conference call constitutes a meeting, shall minutes be recorded?

In summary, it is important for the early members of the organization to think through the processes and outline structure in which the organization will operate. You should outline these processes in the bylaws in a manner that is neither too restrictive nor too vague. Although bylaws may be amended, the amending of bylaws should not be taken lightly and guidelines for such amendment should be clear.

For sample bylaws, see Appendix, Chapter 2, [samplebylaws](#)

## Chapter 3: 501(c)(3) Status and Fundraising Issues

*How do you apply for 501(c)(3) status? What are the legal implications?*

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## I. Nonprofit Status: A Check List

How will you gain and keep tax exempt status? How will you fund your organization?

### Applying for 501(c)(3) Status

- Complete all necessary steps to formalize the organization..
- Determine if you want a private foundation or a public charity.
- Elect the governing board and draft bylaws for the corporation.
- Apply for EIN.
- Apply for tax-exempt status through the IRS. Ensure that the mission of the organization and all substantial activities fulfill the requirements of §501(c)(3).

### State Tax Exemptions for Nonprofit Organizations

- Maintain proper documentation of 501(c)(3) exempt status.
- Meet the exemption requirements set forth by the state laws and constitution.

If organization meets Virginia nonprofit tax-exempt law requirements, specific exemptions include:

- a. **Retail sales and use tax exemption.** Organizations must meet the requirements set forth in Virginia Code Section 58.1-609.11(B) to be exempt from taxes collected on purchases made by the organization, as well as sales the organization makes to others.
- b. **Property tax exemption.** Organizations must propose the exemption for public hearing to the local governing body in which the property is located.
- c. **Sale or lease tax exemption.** Once organizations qualify for the retail sales and use tax exemption, they will be eligible for sales and lease tax exemptions.

- Review applicable state statutes to see if the nonprofit qualifies for more exemptions. In some jurisdictions, organizations may ask for exemptions.

### Maintaining Tax-Exempt Status

- Make sure that Board Members and Staff Members do not campaign for a political candidate as representatives of the nonprofit.

(Lobbying for legislation is permissible within prescribed limits.)

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- \_\_\_\_\_ If your organization engages in business unrelated to agency mission, make sure to pay Unrelated Business Income Tax on that income.
- \_\_\_\_\_ Avoid the Excess Benefits penalty by making sure not to compensate your Executive Director or other key staff in excess of market standards.
- \_\_\_\_\_ File annual returns – Form 990 or 990-EZ.

### **Fundraising**

- \_\_\_\_\_ Formulate fundraising strategy with board and staff members.
- \_\_\_\_\_ Ensure that board is actively involved in primary fundraising responsibilities.
- \_\_\_\_\_ Properly register and obtain permission from state and local governments to solicit funds in the specific localities.
- \_\_\_\_\_ Ensure that all fundraising professionals are properly registered with the state and localities before solicitations begin.
- \_\_\_\_\_ Initiate annual giving campaign first to ensure that operational budget is covered.
- \_\_\_\_\_ Identify and apply for grants from government agencies, foundations, and organizations that are applicable to the mission of the organization.
- \_\_\_\_\_ Solicit major gifts from individuals.
- \_\_\_\_\_ Formulate capital campaign strategies when needed.
- \_\_\_\_\_ Standardize estate planning procedures for individuals who are interested in supporting the organization upon their death.
- \_\_\_\_\_ Implement the “Thank You” process to ensure that every donor receives a receipt or acknowledgement of the date and amount of their donation for tax purposes.

## **II. Applying for 501(c)(3) status**

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### **A. The Benefits of 501(c)(3) status**

An organization whose primary purpose does not include profit will want to consider applying for a 501(c)(3) status. Legally, a nonprofit organization is one that does not declare a profit, but instead allocates all net revenue (after normal operating expenses) to the public interest furthered by the organization. The 501(c) status relieves such organizations from federal income taxes. This status includes many different categories, including the broadest and most well-known, 501(c)(3) category for organizations dedicated to a charitable purpose. The other popular tax-exempt category, Section 501(c)(4), is dedicated to organizations whose primary aims are

political advocacy and lobbying activities. Our LINC organization, on the surface, leans towards the 501(c)(3) classification rather than (c)(4), but will practice lobbying as an insubstantial part of its activities. In Section III, we will discuss how much lobbying a 501(c)(3) can undertake. Other categories are extremely specific (example: 501(c)(5), Labor, Agricultural, and Horticultural Organizations; 501(c)(6), Business Leagues, Chambers of Commerce, Real Estate Boards, Etc.; 501(c)(7), Social and Recreation Clubs, ...). Most organizations that do not meet the specifics of one of those categories file for exemption under 501(c)(3).

The main advantages of forming a 501(c)(3) nonprofit organization include the following:

1. The organization is qualified for tax-exempt status. The nonprofit organization will not pay taxes on the profit of its activities. However, if this profit is not directly related to the activity of the organization, it will not be exempt from taxes. Typically, the organization will not only be exempt from income taxes, but also from property taxes on real estate and other property.
2. The organization may be eligible for public or private grant money. Being a nonprofit charitable organization may ensure easier access to public and private grants, which often require 501©(3) status for eligibility.
3. The organization may solicit tax-deductible contributions. Individuals and organizations are encouraged to donate to charitable organizations, because tax law permits such donors to deduct their contributions from taxable income.
4. Personal liability of the members is limited. Usually, incorporating a nonprofit organization protects the directors, officers, and members of the nonprofit from personal liability for the organization's debts and other obligations. If the nonprofit is sued, the general rule is that only the assets of the nonstock corporation are at risk *unless* there is willful misconduct or self-dealing. However, directors and officers are subject to the duties of diligence, obedience, and loyalty and can be sued for negligence in the performance of those duties.

Once an organization has been granted the 501(c)(3) status, it must adhere to certain duties and restrictions posed by federal and state law. The primary focus of the requirements is to ensure that substantially all its activities relate to its tax exempt purpose outlined in the articles of incorporation. An organization can participate in activities that are remote to its tax exempt purpose, but can only do so as an insubstantial part of its overall operation.

Regular responsibilities of the organization maintaining 501(c)(3) status include:

- Recordkeeping to meet annual IRS requirements for financial and non-financial transparency, as well as to report a summary of funding sources.
- Various filing requirements for lobbying, fundraising, and tax exempt status.
- Disclosure of the initial application for 501(c)(3) status upon request (Form 1023).
- Annual returns through Form 990.
- Allow public to access Bylaws and annual returns.

### ***Classification***

In order to avoid automatic classification as a private foundation by the IRS, a 501(c)(3) must be prepared to distinguish itself as a public charity. Private foundations are subject to a 2% income tax on net investment income and additional tax if they fail to distribute a percentage of their assets for exempt purposes. Other organizations which qualify as public charities include, but are not limited to, churches, schools, organizations formed for the benefit of colleges and universities, hospitals and cooperative hospital organizations, and governmental units. In addition, a nonprofit organization may also qualify as a public charity if the organization meets the 1/3 test. An organization will qualify if the total amount of support that the organization receives, excluding amounts received for services rendered and gross receipts from either governmental units or the general public, is *at least* one third of the total support received by the organization.

## **B. The Application Procedure**

### ***For Federal Exemption***

The IRS explains tax information for charitable organizations on its web site: <http://www.irs.gov/charities/charitable/index.html>. Publication 557 of the IRS gives a detailed explanation of the application process and other miscellaneous questions. You can find it online at: <http://www.irs.gov/pub/irs-pdf/p557.pdf>

- **Charitable Organizations**

Section 501(c)(3) includes organizations with exempt purposes that are “charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and the prevention of cruelty to children or animals. The term charitable is used in its generally accepted legal sense and includes relief of the poor, the distressed, or the underprivileged [...]”<sup>31</sup>

In order to obtain the 501(c)(3) status, an organization must be classified into one of the exempt purposes listed above. Large common groups of organizations, such as churches, educational organizations, health centers, and others have officially been recognized as fulfilling the requirements of the exempt purposes and are mentioned in statutes or case law. Organizations which do not fall into one of those categories can also qualify under a more general requirement of “charitable”. Different tests, developed through time, help to determine if an organization falls within an exempt category.<sup>32</sup>

For the most part, charitable organizations must have been established over time to promote the general welfare of the public.<sup>33</sup> The activities of the organization must benefit people

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<sup>31</sup> IRS web site, *Tax Information for Charitable Organizations, Exemption requirements* at <http://www.irs.gov/charities/charitable/article/0,,id=96099,00.html>

<sup>32</sup> 26 U.S.C.A. § 501, IRC § 501; *St. David’s Health Care System v. U.S.*, 349 F. 3d 232, 235 (2003).

<sup>33</sup> “Generally, a charitable organization has been defined as being devoted to charitable purposes and organized for the purpose of promoting the general welfare of the public, a community, or a class of an indefinite number of individuals.” 1A William Meade Fletcher, *Fletcher Cyc Corps*. § 79 (2002)

who are in need of the specific assistance provided by the nonprofit.<sup>34</sup> Section 501(c)(3) “encompasses a wide range of activities”, and the text of the code should not be read restrictively.<sup>35</sup>

The purpose stated in the articles of incorporation and the mission of the organization are used by the IRS to determine if the organization falls under Section 501(c)(3)<sup>36</sup>, a.k.a the “organizational test”.<sup>37</sup> “The articles of corporation *must* limit the organization’s purposes to one or more of those described at the beginning of this chapter, and *must not* expressly empower to engage, other than in an unsubstantial part of its activities, in activities that do not further one or more of those purposes.”<sup>38</sup> Therefore, it is very important to draft articles to reflect the charitable purpose of the organization. All organizing documents should state the exempt purpose, in an unequivocal manner. It is also imperative to make sure that, if provisions are made in such documents regarding the dissolution of the organization, they respect the interdiction of distribution of funds to the shareholders, members or other individuals. If this were to occur, it would go against the main principle of “nonprofit” organizations. In addition, to qualify for the exemption, the organization must be primarily involved in activities that promote the exempt purpose, a.k.a the “operational test”.

For example, LINC’s primary purpose is “helping people with the business side of cancer.” This statement demonstrates dedication to a general public purpose that is beneficial to the community.<sup>39</sup> “In a legal sense, a charity may be more fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government.”<sup>40</sup> The legal assistance offered by the organization targets a specific group (cancer patients) with a specific need (legal assistance), without being selective or discriminatory. The IRS recognizes the “relief to the poor, the distressed or the underprivileged” as an exempt purpose, and our LINC organization can be classified into this category.

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<sup>34</sup> Allison v. Mennonite Publications Board, 123 F Supp 23, 27 (1954), held that “A charitable organization is defined as: “One whose principal aim is to give of its material substance or time to benefit those who are in need of such assistance [...]”.

<sup>35</sup> “The word “charitable” encompasses a wide range of activities beneficial to the public” 1A William Meade Fletcher, Fletcher Cyc Corps. § 79 (2002); Stockton Civil Theatre v. Board of Sup’rs of San Joaquin County, 66 Cal 2d 13, 20 (1967); Springfield YMCA v. Board of Assessors of City of Springfield, 284 Mass 1, 7 (1933); Burnham’s Estate, 112 Misc 560, 565 (1920).

<sup>36</sup> Therefore, the categories may include a large number of different organizations. Although a organization created under a statute authorizing the incorporation of charitable institutions may be entitled either to the presumption that it is such an institution, or judicial notice that it is a charitable organization, other factors, such as a statement of charitable purpose in the articles of incorporation, are considered in determining its true charitable character, 1A William Meade Fletcher, Fletcher Cyc Corps. § 79 (2002).

<sup>37</sup> IRS Publication 557, *Tax-Exempt Status for Your Organization*, at 19.

<sup>38</sup> Id.

<sup>39</sup> See *supra* note 4;

<sup>40</sup> *In re Estate of Merchant*, 143 Cal. 537, 577.



Before You Fill Out the IRS Application:

The organization needs to be a corporation, limited liability corporation (LLC), unincorporated association, or trust. Differences in set-up procedures, registration, and management exist between these various structures. The establishment of a corporation is the most common model because it has many advantages, including its flexible structure. The LLC is a new model and is more difficult to manage as a charity. As for the unincorporated association, the lack of corporate structure makes it less reliable. Finally, the trust must be a charitable trust but the downside is that the structure is less flexible than a corporation. In any case, all the steps necessary to gain such statuses must have been taken.

1. You must choose your governing board.
  2. You must draft your by-laws.
  3. You must complete all necessary registration steps no matter which structure you choose. Articles of Incorporation must be drafted and presented with the application.
  4. You need to apply for an **EIN** (Employer Identification Number) even if you will not have employees. In order to do so, the organization needs to fill out Form SS-4 before the 501(c)(3) application is completed and attach a copy to the exemption application.
- Application for the Exempt Status

**N.B.:** You need only file the application if the organization's annual gross receipts are more than \$5,000.

**N.B.2:** You must file within 15 months after the organization is created. However, an automatic extension of 12 months is available.

For a 501(c)(3) organization, Form 1023 needs to be filed. Other organizations under other sections of 501(c) typically need to fill out Form 1024, but are sometimes not required to fill out any form. Form 1023 has recently been revised and now includes all documents necessary for the application, simplifying the burden of the paperwork. The form must be filled out thoroughly, with attached copies of all requested documents.

Be sure not to forget the following, or the application will not be complete:

1. The user fee. Form 8718, *User Fee for Exempt Organization Determination Letter Request*, has been included in Form 1023 and covers registration costs. Each paragraph of section 501(c) has a different fee which is specified in the Form.
2. All organization's organizing documents (Articles of Incorporation or named Articles of Corporation and Certificate of Incorporation)

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3. A description of the organization's activities, which will be used by the IRS to determine if the purpose is an exempt one.
4. Financial statement of the current year and the budget for the next 2 years, or 3 years of financial statements.
5. Form 2848, *Power of Attorney and Declaration of Representative*, must be filled out if an attorney is representing your organization.

*You may want to consult an attorney to ensure the application is filled out correctly and thoroughly, and that all mandatory steps are taken. He/She may be able to offer advice regarding other organizational documents. Moreover, he/she may also help out with tax-related matters during the life of the nonprofit. While the cost of the attorney is generally a drawback, some attorneys may perform this work pro-bono. Lawyers should give 50 hours per year of their time for pro-bono work. Therefore, you might be able to find a lawyer willing to allocate some of these hours to nonprofit work. Ask lawyers you know or find out about potential programs in your community which provide lawyers for assistance in setting up nonprofits. For example, your local bar association may organize pro-bono programs.*

The IRS might require you to provide more information or more documents later in the process (example: contracts, lease the organization has entered into). In addition, the IRS might request a more detailed explanation of the purpose of the organization to reveal its exempt purpose more clearly.

Once the IRS has reviewed Form 1023/1025, if the purpose of the organization fits the general exempt purpose of Section 501(c)(3), the IRS issues a ruling or a determination letter recognizing exemption. When the letter is issued, it recognizes the organization retroactively, from the date it was formed. If the IRS refuses to recognize the organization, revision and appeal procedures can be undertaken.<sup>41</sup>

- Application for a Subordinate Organization

A central organization can ask the IRS to recognize a subordinate organization. Subordinate organizations must be affiliates of the central organization and must generally fulfill all the requirements of the central organization (organizing documents, exempt purpose, purposes and activities, accounting, time period of filing), although they need not be incorporated. The central organization must issue a group exemption letter for the subordinate organization to be covered by the exemption, rather than filing Form 1023, including the contact information for the subordinate organization. This information will be reviewed annually. The central organization must be in control of the subordinate and in position to certify that the subordinate organization's purposes are falling under the exempt category.

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<sup>41</sup> IRS Publication 557, *Tax-Exempt Status for Your Organization*, at 4-6.

## C. Annual Requirements for Nonprofit Organizations

Your nonprofit organization must file:

1. Annual Information Returns, Form 990 or 990-EZ. The returns must state specifically the items of gross income, receipts, and disbursements, and such other information in order to comply with the IRS requirements. Only certain types of organizations are exempted (Exceptions in General Instruction B of the 2004 Instructions for form 990 and 990-EZ of the IRS, and section 501(c)(3) organizations that have gross receipts of \$25,000 or less).
2. Unrelated Business Income Tax Returns, Form 990-T, if the organization is earning more than \$1,000 a year from unrelated trade business.

### *You can obtain IRS Forms and Publications*

1. By visiting your local Federal IRS Building.
2. By calling 1-800-829-3676 (1-800-TAX-FORM). [TTY/TDD 1-800-829-4059]
3. By Fax. From a fax machine, dial (703) 487-4160 and follow voice prompts.
4. Over the Internet:
  - <http://www.irs.gov>
  - For Form 1023, read the IRS Publication 557, revised in March 2005, at <http://www.irs.gov/pub/irs-pdf/p557.pdf>

## III. State Tax Exemptions for Nonprofit Organizations

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Nonprofit organizations do not automatically qualify for tax exemptions. The Internal Revenue Service must determine that the organization qualifies for the exemption and will issue a letter recognizing the organization's exempt status. While a 501(c)(3) organization which qualifies for a federal tax exemption will often qualify for a state law exemption, organizations must make sure that they also comply with state law.

### A. Filing for the Exemption and Types of Exemptions: Virginia Law

After the 501(c)(3) organization acquires the proper documentation letter from the IRS for federal tax exemption, the organization must follow applicable state laws to qualify for state tax exemption.

1. Retail sales and use tax exemption. Va. Code Ann. §58.1-609.11 (2004) Sales tax applies to sales of tangible property or taxable services made in accordance to specified regulations under the Virginia Code Chapter on Retail Sales and Use Tax. The use tax applies to the "use, consumption, distribution and storage of tangible personal property." Depending on the nature and activities of the nonprofit organization, these taxes may apply to both purchases made by the organization and sales the organization makes to others. See also Va. Code Ann. §§58.1-602, 603 and 604 for more information on imposition of sales and use taxes.

2. Requirements for retail sales and use tax exemption. In order to qualify for the Virginia retail sales and use tax exemption, a nonprofit organization must meet the criteria set forth in §58.1-609.11(B):

- The organization must be exempt from federal income taxation under IRC Section 501(c)(3).
- The organization's annual gross receipts must be less than \$5,000 and must be organized for a purpose under Section 501(c)(3).
- The organization must comply with and provide verification of compliance with Virginia solicitation laws. For more specific information, organizations may contact the Department of Agriculture and Consumer Services at (804) 225.3924 (<http://www.tax.virginia.gov/site.cfm?alias=SUTExemption>)
- The organization's annual general administrative costs, including salaries and fundraising, may not exceed 40% in relation to the organization's annual gross revenue.
- If the organization's annual gross exceeded \$250,000 or more in the previous year, then the organization must provide a financial audit. The audit must have been performed by an independent certified public accountant. The Virginia Society of CPAs sponsors a volunteer program throughout the state in which trained tax experts offer help to nonprofits with non-professional management. For sound financial advice and appropriate record keeping, organizations may want to take advantage of this program.
- The organization must also file a copy of either the Federal 990 or 990 EZ tax form filed with the IRS to the Virginia Department of Taxation.
- If the organization filed neither of the previous documents, then the entity must also file the names and addresses of at least two members of the Board of Directors, and the location of the organization's financial records for public inspection.
- Excluding sales tax, the organization must also provide an estimate of its total taxable purchases for the following year, the current year and the previous year. Again, organizations should enlist the help of an accountant during this process.

***Where to Apply***

Organizations may now apply for the retail sales and use tax at Nonprofit Online by creating a user ID and password. Applying online may be more efficient, and organizations may update their information as it changes. They may also print their retail sales and use tax certificates for their own records.

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Organizations which do not have online access may request an application by contacting the Nonprofit Exemption Team at (804) 377.3712. Complete applications should be mailed to:

Department of Taxation  
Nonprofit Exemption Team  
P.O. Box 27125  
Richmond, VA 23261-7125

3. Property tax exemption. Va. Code Ann. §58.1-3651 (2004). Pursuant to the Constitution of Virginia, “any county, city or town may by designation or classification be exempt from real or personal property taxes, or both, by ordinance... real or personal property owned by a nonprofit organization...” In order to qualify for this exemption, the organization must use the property for the specific purpose for which it is either classified or designated. This exemption applies to nonprofits that use such property for charitable purposes.

To obtain the designation or classification, the nonprofit organization must submit a proposal to the local governing body of the location of the real property. The local governing body will then publish a notice of public hearing in the location of the real property. The organization must pay the governing body for the publication. The notice will include the assessed value of real and tangible property for which the organization requests an exemption and the property taxes normally assessed against the property. If feasible, nonprofit organizations should consult an accountant or an appraiser to obtain their own record of the real and tangible property values.

The public hearing will be held at least five (5) days after publication, and citizens will have the opportunity to comment on the real property at issue. The governing body will consider, among other things; whether the organization is exempt under Internal Revenue Code Section 501(c), whether the property has obtained the appropriate licenses for activity on the property and whether any part of the net earnings has inured to the benefit of any individual. The governing body will also examine the source of the funds generated by the organization, the services the organization provides and the organization’s activities, and the revenue impact on the locality and the taxpayers. See also Va. Code. Ann. §58.1-609.1 (2004) (governmental and commodities exemptions) In order to retain the exemption, the nonprofit organization must continue to use the property in accordance with the specified purpose under the classification or designation.

4. Sale or lease tax exemption. Va. Code Ann. §58.1-623 (2004) (sales or leases presumed subject to tax, exemption certificates) Lease taxes apply to the leasing or renting of tangible personal property. If a nonprofit organization has qualified for retail sales and use tax exemption under Section 58.1-609.11 then the organization will also be exempt from the collection of tax on sales or leases related to tangible personal property, unless the Tax Commissioner notifies them otherwise. See also Va. Code Ann. §58.1-602.
5. Miscellaneous exemptions. Organizations should review their activities in relation to applicable state statutes to see if they qualify for any additional exemptions. Depending on the local government’s policies, nonprofit organizations may be able to request exemptions if

they provide adequate justification for their requests. See Va. Code. Ann. §58.1-609.10 (2004).

## **B. Duration of Exemptions**

Va. Code Ann. §58.1-609.11 (2004) Each exemption will last no less than five (5) years and no more than seven (7) years. However, if an organization fails at any time to comply with any of the criteria set forth under Section 58.1-609.11(C), the Department of Taxation may revoke the exemption. Organizations must provide the all of the same information required to obtain the initial exemption, making sure they maintain or renew the appropriate exemptions on time. Organizations must also continue to meet the applicable criteria required for exemption.

## **C. The Donor Tax Exemption**

Va. Code. Ann. §58.1-609.10 (2004). The Virginia Code and the Revenue Reconciliation Act of 1993, both discuss the exemption for charitable donations by donors to organizations exempt under IRS Section 501(c)(3). Donors may claim a deduction for a contribution, in cash or non-cash, of \$250 or more, but the donor must obtain written acknowledgement of the donation from the nonprofit organization. It is the donor's responsibility to obtain the proper documentation, not the organization's responsibility. However, it would be good practice for nonprofit organizations to provide receipts to donors as soon as the organization receives the donation.

## **D. Exemptions Summarized**

While nonprofit organizations enjoy the privilege of federal and state tax exempt status, these organizations must continually review their activities and keep proper documentation to retain their status. Organizations should keep proper records of IRS and state recognition of their tax exempt status, specifically the letter stating their exemption, in addition to the articles of incorporation and by-laws. For continuity of existence and efficiency, organizations should also seek the help of professionals such as certified public accountants and lawyers to help maintain documents and accounting records.

# **IV. Maintaining Tax-Exempt Status: Restrictions**

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The nonprofit sector of our economy has grown tremendously in part because of the liberal tax policies of the Federal Government. (State governments and municipalities have followed the federal model and have provided their own exemptions for income tax, property and sales taxes). The Federal Tax Code enables §501(c)(3) organizations to operate as tax exempt operations and permits the nonprofit's donors to claim charitable deductions.

In return for this generosity, the Internal Revenue Service requires nonprofits to operate according to their own charters and by-laws and to follow some simple rules as described below. A nonprofit Executive Director and Board President must educate all paid staff and volunteers about these rules so that the nonprofit organization's tax exemption will be secure.

### **A. Endorsing Candidates for Public Office: Strictly Prohibited**

Under no circumstances may members of the nonprofit's Board of Directors or staff campaign in the nonprofit's name for a political candidate. This rule was challenged by Branch Ministries, a tax exempt church, which urged Christians not to vote for Bill Clinton because of his position on certain moral issues. As a result of this political activity, the IRS revoked the church's tax exemption and required it to pay back taxes for an extended time period. The Branch Ministries Church appealed the IRS ruling (*Branch Ministries v. Rossotti*, D.C. Circuit, 2000), claiming that the First Amendment protected free speech which would include political advocacy. The Court clarified that a church in its official capacity could exercise its free speech and support whatever candidates it desired, but it would lose its tax exempt status. The Constitutional right was Free Speech and not the right to a tax exemption.

Does this prohibition mean that a community member upon joining a nonprofit's Board of Directors can no longer support political candidates? No, this refers only in their capacity as Board members of the nonprofit. Any Board Member in his private capacity can contribute financially to a political campaign, speak on behalf of candidates, attend political rallies, and function exactly as he had prior to joining the Board of the nonprofit. The Board Member simply must separate his personal advocacy of candidates from his activity as a Board Member.

### **B. Lobbying for Causes: Permitted Under Certain Circumstances**

Congress made some key decisions in designing the Internal Revenue Service Code. Under the §501(c) statutory section, Congress established different subsections governing different kinds of nonprofits. Hence there are nonprofits that are chiefly advocacy organizations. Such organizations should apply for §501(c)(4) status, which will give the board and staff of these organizations maximum flexibility regarding lobbying. §501(c)(3) organizations in contrast, are service-oriented organizations and deliver social service, health-related, educational, and religious programs as their primary purpose. These organizations are permitted to engage in some advocacy for legislative causes but are restricted in terms of the financial resources that they may devote to this activity. This is a reasonable distinction, since a nonprofit is given a choice from the start how to define its primary objective and the IRS has the right to assign the lobbying privilege accordingly.

A church association challenged this limitation on lobbying on the grounds that the First Amendment, that protected free speech, also protected advocacy of legislation. In the 1972 case of *Christian Echoes National Ministry, Inc. v. United States*, the Tenth Circuit Court of Appeals affirmed the IRS revocation of the association's tax exemption based on its periodical's advocacy to "maintain the McCarran-Walters Immigration Act," "discourage support for the World Court," and "cut off diplomatic relations with Communist countries." The Court concluded that "a substantial part of [the nonprofit's] activities consisted of carrying on propaganda, or otherwise attempting to influence legislation." The Court, in explaining the IRS ruling, advised that "tax exemption is a privilege, a matter of grace rather than right." Free speech, including advocacy for legislation, was a First Amendment right but the government was not compelled to financially underwrite lobbying by means of a tax exemption.

### ***How Much Lobbying is Too Much?***

To begin, a nonprofit may promote awareness of legislative issues as much and as often as it likes if its approach is non-partisan in nature. For example, when the League of Women Voters holds a debate and invites candidates of all points of view to participate, that activity is not considered lobbying by the IRS. Lobbying, by definition, is a partisan activity, meaning that the organization is advocating a particular stance or position on prospective legislation.

Lobbying will only be limited if it is institutional rather than personal. An individual in her private capacity has an unlimited right to lobby. She may phone her legislator or governor and advocate for a specific piece of legislation at any time. It is only if she does her advocacy under the nonprofit's banner that her advocacy will be considered lobbying and measured by IRS standards.

Turning now to the organization, at what point does a nonprofit's lobbying exceed the permissible limit set by the IRS? The limitation on §501(c)(3) organizations is not quantified but articulated as "not a substantial part of the nonprofit's activities." This very vague standard can be troubling to a nonprofit which wants to lobby without jeopardizing its tax exempt status. The Executive Director, in order to monitor the amount of resources devoted to lobbying, should keep track not only of such material costs as pamphlets and advertising, but should also keep timesheets for his time and that of other staff and volunteers devoted to advocacy.

Organizations that are worried by the vagueness of this statutory language and fear exceeding the IRS limit may elect §501(h) status which does provide quantifiable standards for lobbying. Under this statutory subsection, a nonprofit that has exempt purpose expenditures not exceeding \$500,000 can devote up to 20% of its exempt purpose income to lobbying. Of that amount spent on lobbying, up to 25% can be earmarked for "grass roots" lobbying. Although the §501(h) election seems to be an attractive alternative, in reality few nonprofit organizations choose to go this route because of the additional paperwork that is required.

### ***Setting a Policy for Lobbying Restriction***

#### **1. Initial Stage of Operation**

When founders establish a §501(c)(3) charitable organization, such as a nonprofit that provides legal and business advice for persons undergoing cancer treatment, they should focus their initial efforts on hiring a staff (or if no staff, organizing volunteers to assume "service roles"), determine what programs will be offered, and establishing basic operational policies. This will involve such matters as setting fees or fee scales for services and determining how funds are to be generated to subsidize operations of the nonprofit. Lobbying should therefore be on hold until the organization is viable as a service provider.

This does not mean, however, that the organization need be silent on the matter of legislative issues. This would be a good time for the Board President to appoint a board committee to track legislative bills and report to the Board what issues are before the General Assembly so that individual Board members in their private capacity may "lobby" their representatives.



## 2. Intermediate Stage of Operation

Once the nonprofit is providing quality services and generating sufficient funds to cover agency costs, it may expand its activities to include legislative advocacy. The committee that had served initially as an information vehicle for Board Members regarding legislative issues might readily be transformed into a Legislative Advocacy Committee. Since the nonprofit at this point should be sufficiently advanced to support a paid Executive Director, that person or a senior staff designee could work with the Board to design and implement lobbying efforts. The Executive Director, who in a small organization will have taken on risk management activities in any event, will serve as the watchdog to be sure that IRS limits on lobbying are not violated.

## 3. Advanced Stage of Operation

After a few years in existence, the Board of Directors may come to look upon its Legislative Advocacy Committee as a key contributor to the welfare of the community. Following a legislative victory, perhaps adoption by the General Assembly of a statutory requirement that health insurance policies issued in the Commonwealth provide certain benefits for cancer survivors, the committee may be ready to become even more aggressive on the state or national level. There are several options available at this point. The nonprofit may elect the §501(h) status which will enable the organization to fund more lobbying activities than it had up to that point or it may decide at this juncture to spin off a separate nonprofit specifically devoted to advocacy with §501(c) (4) exempt status. The major restriction on operating two entities will be that funds from one organization must not finance activities of the other. A third alternative may be to join forces with another nonprofit that has a similar focus, like the American Cancer Society, and jointly operate an advocacy organization. As the nonprofit matures, it will consider the wisdom of hiring designated staff to carry on lobbying activities. Hiring such staff means conforming to additional federal and state regulations which the Executive Director should research before any hiring takes place.

### **C. Restrictions on Business Activities: Unrelated Business Income Tax**

The IRS will hold the nonprofit to activities that conform to its enumerated purposes. Charters and by-laws may, of course, be amended by the Board of Directors. Are there other permissible ways for a nonprofit to add activities that are not “substantially related” to the charitable purpose defined in the original charter of incorporation? Yes, it may undertake these new business activities that are unrelated to the original purpose, providing that it pays tax to the federal government, the Unrelated Business Income Tax. If the nonprofit fails to pay the tax, the IRS may penalize the organization through monetary penalties or even the loss of its tax exemption.

A nonprofit, therefore, has a choice regarding business unrelated to its original purpose, much as it does with regard to lobbying. If a nonprofit wishes to engage in an unrelated business activity, it must pay tax on this activity. It may wish to split off such ventures into for-profit subsidiaries for which it will not claim a tax exemption but pay the corporate income tax. The after tax income of these subsidiaries continue to support the tax exempt organization. The advantage of creating the taxable subsidiary is that it will prevent IRS concern regarding the tax exempt status of the original nonprofit organization.

Nonprofits must be careful to test their own programs, especially as they expand in new and creative ways, to be certain that they have not unwittingly generated Unrelated Business Income.

### ***Setting a Policy with Regard to Unrelated Business Income***

#### **1. Initial Stage of Operation**

New nonprofit organizations generally will not undertake unrelated business at the beginning. Initially, it will want to carry on only those activities clearly related to the Mission of the organization as established by the founding members and articulated in its charter.

#### **2. Middle Stage of Operation**

Successful nonprofits will identify opportunities for service expansion as their tenure in the community lengthens and their reputation grows, especially when they are called upon to expand services. The organization may need more funds to operate and come to regard auxiliary business ventures as a means of generating revenue to subsidize low-income recipients of their primary services. Whether the organization creatively develops new opportunities or is offered these opportunities, it is vital that the Executive Director review possibilities for program or fund-raising expansion with regard to the IRS regulations governing Unrelated Business Income. So, for example, what if the annual bake sale, which was so successful that it is now held four times a year, leads to a plan for establishing a bakery? Operation of a bakery will be an activity that is a business or trade, not substantially related to providing information to the charitable purpose, and it will be regularly carried on. The nonprofit will have to pay Unrelated Business Income Tax on its profits from this activity.

#### **3. Advanced Stage of Operation**

When unrelated business activities have become so profitable that their proportion of an agency's income becomes sufficiently large, it would be prudent for the nonprofit to split off the activity into a separate for-profit subsidiary to proactively guard against an IRS questioning of the nonprofit entity's tax exempt status. So, building on our example, once the nonprofit's bakery is up and running and is generating 25% or more of the nonprofit's revenue, it would be time to consider splitting off the enterprise into a separate for-profit, taxable subsidiary, one whose after-tax profits will go to the support of the tax exempt organization. Another reason for spinning off the bakery enterprise is that the bakery may be taking up so much of the Executive Director's time and concentration that it a detriment to the effective operation of the nonprofit. The new for-profit subsidiary will have its own director and designated staff and its own Board of Directors.

### **D. Other Restrictions on Nonprofits**

#### **1. Excess Benefits**

The corporate world has been rocked with scandals over the past two decades with such spectacular debacles as Enron that destroyed companies and harmed innocent stockholders and

employees. The nonprofit world also had its “Enron” in a United Way scandal that involved a lavishly paid Executive Director who took leisure vacations with his mistress at donor expense. In the nonprofit world, this led to a heightened scrutiny of the salaries and benefits provided for nonprofit executives with penalties assessed for what were deemed to be “excess benefits.”

The penalty, termed “Intermediate Sanctions,” forces the excessively paid nonprofit executive to pay a 25% fine on the amount over a reasonable salary based on the size and scope of the agency he directed. If the problem is not quickly corrected by an adjustment downward in salary and benefits, a 200% fine is imposed. In addition, Directors who approve such excessive compensation will be fined 10% of the excess sum paid, up to a ceiling of \$10,000.

A beginning nonprofit is more likely to struggle with how to pay its Executive Director a livable wage rather than with “excess benefits.” Nevertheless, even from the beginning, the new nonprofit should follow good practice, setting salaries in the proper way, which requires that the Board’s Compensation Committee or Executive Committee obtain comparables for Executive Directors of similar size agencies. Should the nonprofit ever be questioned about its compensation of the Executive Director, it would have the data on file to prove compliance with the statute. Although this discussion has been solely of the Executive Director’s compensation, the mature nonprofit may have several highly-compensated employees for whom it should set salaries within a market range as dictated by comparables from similar size agencies.

## 2. Licenses and Permits

Less serious miscues on the part of a nonprofit may not result in the loss of a tax exemption, but they should also be avoided since they could result in fines and adverse publicity for the organization. For these reasons, it is always prudent for the staff director or the Board President to question whether a particular activity, especially in the area of fund-raising, is permitted, and if so, whether it requires a license.

A nonprofit that is registered with the State authority to fund-raise may still be liable to reprimand or fine if it serves alcoholic beverages to attendees at the annual event without a license to sell liquor or if it sponsors a form of gambling that is not permitted by law. Prior to a gala fund-raising dinner or launching bingo games to generate funds for the agency, the nonprofit staff or board must research these matters and obtain the requisite licenses. In Virginia, a nonprofit organization may serve alcoholic beverages at an event providing it applies for a one-day banquet license from the Virginia Department of Alcohol Beverage Control.

While many forms of gambling are illegal in Virginia, even for charities, the Commonwealth permits nonprofits to sponsor bingo and raffles providing that the Department of Charitable Gaming has granted a permit. Interestingly, betting on “duck races” sponsored by nonprofits is permitted as a type of raffle. At bingo and raffles, many rules must be observed, including the posting of the phone number of “Gambler’s Anonymous” at such events. See Virginia Code § 18.2-340.15 for particulars.

## **E. Restrictions: A Summary**

A nonprofit's Board and Staff must adhere to IRS and other governmental restrictions in order to retain the nonprofit's tax exemption which the IRS has defined as a privilege and not a right. The only absolute prohibition is that the nonprofit, through its staff or Board, must not campaign for political candidates. The restrictions with regard to lobbying and unrelated business income do not prevent these activities but do limit how they may be carried out. Since the IRS provides alternatives, every nonprofit should be able to carry out activities important to its constituency without violating the law. As with other matters, thorough orientation for new staff, Board members, and volunteers and ongoing training is essential so that uninformed persons will not jeopardize a nonprofit's tax exempt status.

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## **V. Fundraising: Where should You Start?**

Fundraising for charitable organizations is simply the activity of soliciting money or pledges for the operational benefit of the organization. Solicitation of funds is the critical element to the success in achieving the organization's mission and vision. Given this importance, Charitable Solicitation Laws have been created to minimize abuse of nonprofit status, protect donors from fraud and misrepresentation, and reduce waste of charitable money.

Charitable contributions can come in various forms, including cash, securities, personal property, and real estate. All fundraising begins with an "Ask". "Asks" are done in various forms, whether directly or indirectly, by board members, staff, and/or hired fundraising professionals. However, before "Asks" can begin, it is paramount that nonprofit organizations form a fundraising strategy, as well as take certain preliminary legal steps.

### **A. Formulating Your Fundraising Strategy**

The following steps should be followed in order to identify and formulate the fundraising strategy for any charitable organization. Particular attention should be paid to the demographics of the city, as well as the companies, wealthy individuals, and foundations that already exist in the area. In addition, the organization must do extensive research on other nonprofits in the area and the particular fundraising methods that are used by these charities.

1. Clearly define target audiences that will support the organization's mission. The key target audiences are those foundations, organizations, government agencies, individuals, and other nonprofits that will donate the initial gifts to the organization.
2. Formalize a plan for securing annual operational revenues. These typically come from Annual Giving campaigns in various forms, so an analysis of the most efficient and effective means of solicitation must be completed. (Methods are discussed later in this manual.)
3. Incorporate other solicitation methods. These might include major gifts, capital campaigns, grant requests, and estate planning. Similar to Annual Giving, an analysis of the most

efficient and effective means of solicitation must be completed. (Methods are discussed later in this manual.)

4. Decide who should do the asking.
5. Board Members: Primary fundraising responsibilities should always be in the hands of the board. If necessary, the board should form a Fundraising subcommittee nominating particularly influential members to this committee in order to help orchestrate the fundraising process. The following is a list of board member fundraising duties and rules that each charitable organization should implement.
6. Each board member should make a personal commitment to the organization.
7. Board members ask other board members for a personal commitment. Staff members should not be involved in these one-on-one asks.
8. Board members must assist in developing key prospects, including contributing to the mailing list and identifying valuable donors, wealthy individuals, organizations, and foundations.
9. All board members must actively participate in soliciting donations, including annual and capital campaigns, introductions to staff, support letters, and “Thank you” follow-ups.

**Fundraising Professionals:** Charitable organizations will often use fundraising professionals when a greater amount of help is needed to orchestrate the solicitation strategy. Their duties include acquiring new donors, renewing and upgrading existing donors, maximizing gifts from foundations, organizations, and individuals, and assisting in grant writing process. Fundraising professionals come in different capacities, including:

*Fundraising Development Officer* – a full time employee of the charitable organization that receives salary and benefits.

*Fundraising Consultant* – an outside consultant used to guide staff, board, and volunteers. Consultants will assist in conducting “Asks”, but will not do the “Ask” directly.

**Professional Solicitor** – an outside solicitor that is hired and paid a commission.

Organizations should be wary in using this type of fundraising professional. Although it is not illegal, this method could be perceived as unethical to the public.

## **B. Registering for Solicitation**

Most states within the U.S. have created Charitable Solicitation Acts in order to regulate solicitation activities. More than 30 states have adopted “comprehensive” charitable solicitation acts which help to simplify the fundraising regulations for those charitable organizations that solicit in numerous states. In general, Charitable Solicitation Acts require organizations to apply for and acquire permission from the state to commence fundraising activities. Organizations are

subject to various fees throughout the registration process. If fundraising violations occur, the organization will lose its privileges to solicit charitable contributions.

Charitable organizations that solicit in more than one state must register separately with each state. If solicitation occurs statewide, the organization must also research if it needs to be registered with each locality within the state where fundraising occurs. With the increasing popularity of Internet solicitations, organizations must also research the requirements regarding registration within each state. Depending on the state, Internet solicitations may not be addressed specifically. In short, if the organization is receiving a considerable amount of donations via the Internet in states where permits for solicitation have not been granted, then the organization could be in violation of solicitation laws.

***Registration Steps for Solicitation by Charitable Organization in the Commonwealth of Virginia:***

- ***Step 1:*** Per § 57-49 of Virginia Code, every charitable organization which intends to solicit contributions or have funds solicited on its behalf in the Commonwealth must file an initial registration statement with the Commissioner prior to any solicitation activity. Each registration statement must be refiled on an annual basis as long as solicitation activity continues.

Section 57-49 of Virginia Code outlines a number of items that are needed for registration, including the following key items:

- A certified copy of the preceding year's fiscal balance sheet and income statement with an opinion from an independent accountant; a certified copy of previous year's fundraising activities, including kind and amount of funds raised, fundraising expenses and allocations of funds raised with an opinion from an independent accountant, or copy of IRS Form 990. Any organization with gross revenues of less than \$25,000 may submit a balance sheet and income statement verified under oath by the treasurer of the organization.
- A statement indicating whether the charitable organization intends to solicit contributions from the public directly or have the solicitation done on its behalf by others.
- An outline of the general purpose for solicitation, name(s) of the solicitors, name(s) of the individuals or officers who will take custody of the contributions, name(s) of the individuals or officers who are responsible for the final distribution of the funds, and types of solicitation that will be undertaken.
- A copy of the current articles of incorporation, bylaws, or other governing documents.

- All organizations must include the following language:

“No funds have been or will knowingly be used, directly or indirectly, to benefit or provide support, in cash or in kind, to terrorist, terrorist organizations, terrorist activities, or the family members of any terrorists.”

- **Step 2:** Every charitable organization must pay annual fees before being granted permission to solicit in Virginia. The fee structure is tiered, so payment is based on gross contributions of the preceding year. Charitable organizations filing for initial charitable solicitation registration that have no previous financial history must pay an initial fee of \$100. Charitable organizations filing for initial charitable solicitation registration that have previous financial history must pay an initial fee of \$100 in addition to the annual registration fee. Organizations that allow the registration to lapse must resubmit an initial registration.
- **Step 3:** Every charitable organization must maintain fiscal records that are in accordance with the Standards of Accounting and Financial Reporting for Voluntary Health and Welfare Organizations. A copy of the records must be on file in the office of the Commissioner and will be retained for a period of at least three years.
- **Step 4:** For charitable organizations with previous fundraising history, a report detailing the percentages of fundraising expenses compared to public donations from the preceding fiscal year must be filed annually.
- **Step 5:** If a charitable organization has a contract between charitable or civic organizations and professional fundraising counsel or professional solicitors, every contract must be in writing and filed with the Commissioner within ten days after the contract has been signed.

*\*\* If the charitable organization chooses to employ Professional Fundraisers for solicitation, there are certain requirements and steps that you must follow for registration purposes. Please see local code for the specific criteria.*

### ***Exemptions from Registration***

Per § 57-60 of Virginia Code, a number of persons are exempt from registering for charitable solicitation in the Commonwealth of Virginia. No charitable or civic organization shall be exempt unless it submits a statement explaining the reason for the claim to the Commissioner. If the organization is exempted, the Commissioner will issue a letter of exemption which may be exhibited to the public. A \$10 fee must be paid by every organization requesting an exemption.

The various exemptions include:

- Charitable organizations who do not intend to solicit or receive within one year, public contributions in excess of \$5,000 if all of solicitations and fundraising activities are executed by non-paid individuals. In addition, these individuals can have no part of their assets or income benefit or be paid to any officer or member of the organization. If solicitations reach in excess of \$5,000, the charitable organization must register for charitable solicitation within 30 days.

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- Organizations that solicit only within the membership of the organization by the members themselves.
- Charitable organizations which confine solicitations in the Commonwealth to five or fewer contiguous cities and counties.

### ***Registration Steps for Solicitation by Professional Fundraising Counsels and Solicitors in the City or County***

In some cities, towns, or counties, a charitable or civic organization may be subject to regulations or require licensing before charitable solicitation can occur in the particular locality. The charitable organization is responsible for researching the Charitable Solicitation acts for each locality in which it wishes to solicit contributions.

For example, per § 28-3 of Roanoke City Code, any charitable organization undertaking charitable solicitation within Roanoke City, and is required to register with Commonwealth of Virginia, must register with the city manager.

## **C. Implementing Your Fundraising Strategy**

Once a fundraising strategy is formulated and the charitable organization and any professional fundraising counsels or solicitors assisting the organization are registered with the state and other localities, the organization can commence its fundraising activities and campaigns. “Asks” can be categorized into three major forms: 1.) Annual Giving; 2.) Special Purpose; and 3.) Estate Planning.

### ***Annual Giving***

Annual giving campaigns are for the sole purpose of recruiting new donors and renewing existing donors. Every charitable organization must have annual donations in order to cover annual operating costs. Typically, an organization will use two or more forms of annual giving campaigns, some of which are more efficient and effective than others. Types of campaigns include the following:

- *Donor Acquisition Direct Mail Campaign* – This type of campaign is used solely for new donor acquisition. Charitable organizations send out a mass marketing mailer using third class, bulk mail rates. Although a satisfactory response rate is only 1% to 2%, organizations need to remember that the value of the donor does not rest within the first gift. The value of a donor equals the lifetime contributions to the organization.

Steps for direct mail campaigns include the following:

**Step 1:** Identifying target audiences that will respond to the mailer.

**Step 2:** Formulating, purchasing, or leasing up-to-date mailing lists of the target audiences.

**Step 3:** Preparing a comprehensive packet including brochure on the organization, letter, response form, and reply envelope.



**Step 4:** Assembling donor receipts and thank you notes from the organization.

- *Donor Renewal Direct Mail Campaign* – This type of campaign is used solely for renewing previous donor contributions. In contrast to donor acquisition direct mail campaigns, organizations can expect a 50% response rate.
- *Telephone and Television Campaigns* – This type of campaign allows the organization to create a verbal and/or visual dialogue with the donor. Organizations can expect 5-8% response rates from these types of campaigns. However, typically only 80% of the pledges are realized.
- *Benefit Events* – This type of annual giving event is the most expensive and least profitable for an organization. The majority of the proceeds will come from ticket sales and sponsorships. Although expensive, benefit events are perfect for public relations as well as providing volunteer opportunities that are often attractive to particular donors.
- *Other Annual Giving Methods* - Annual giving does not always have to be in the form of money. Annual donations can also come in the forms of gifts-in-kind, advertising, and volunteering, among many others.

Typically, an organization will form an Annual Giving Committee to organize and lead the various annual campaigns. The committee will then divide and conquer on annual solicitations from individuals, businesses, and corporate prospects.

#### **D. Special Purpose Programs**

Special Purpose Programs solicitations are one time gifts from governments, individuals, organizations, or foundations that are given for a specific need or project. Types of campaigns include the following:

- *Major Gifts from Individuals* – This type of campaign requires extensive research on potential individual donors including financial capabilities, enthusiasm for the charitable purpose, and attraction to the particular project. In addition, the organization should create a system of recognition for the donations through public advertisement of donation, naming opportunities, or board appointment.
- *Grants* – Grants come from government agencies, foundations, or organizations who want to provide support based on extensive applications that are submitted by the organization. Grant allocations are awarded competitively, so the applications must conform to the goals and mission of the grantors. Grants can be a substantial source of operating revenues for start-up charitable organizations. A few key websites that provide essential information regarding grants are the following:
  - **Guide Star ([www.guidestar.org](http://www.guidestar.org))** – The most comprehensive source of grant information available online. Organizations or individuals seeking grants can search for potential

funderson, review historical grant activity, and evaluate past funding for similar organizations

- **www.grant.gov** – A website providing capabilities to electronically find and apply for competitive grant opportunities from all Federal grant-making agencies. The site hosts all application procedures including the ability to check status of the application. A charitable organization can also register for email notification of grant opportunities.
- **The Foundation Center (<http://fdncenter.org>)** – A website dedicated to collecting, organizing, and communicating information on philanthropy in the United States. The organization conducts and facilitates research on trends in the field, provides education and training on the grant-seeking process, and ensures public access to necessary information.

The grant-seeking and grant-writing process is very time intensive. Charitable organizations benefit greatly if they have a member of their staff or board who is skilled at the grant process and has a wealth of knowledge about the types of agencies and foundations that could potentially help their organization. Each application is different, as they are very specific to the organization requesting funding as well as the donor’s mission.

- **Capital Campaigns** – This type of solicitation is a comprehensive campaign targeted towards a particular purpose. Major gifts from individuals and grants are also included in capital campaigns. Typically, organizations find capital campaigns to be the most effective, cost efficient and enjoyable as board members, staff, and general supporters of the organization work together in the fundraising effort.

**\*\* N.B.** Local governments can also allocate budgetary funds to charitable organizations outside of grant contributions. Charitable organizations with similar missions or goals will typically create coalitions and solicit extra funds from the government as a whole in order to make the cause more appealing in budgeting decisions.

### ***Estate Planning***

Estate planning solicitations are gifts made to a charitable organization that will be realized in the future. This type of donation allows donors who have a history of involvement and participation in the organization to benefit the future wherewithal of the nonprofit. Types of campaigns include the following:

- ***Wills and Bequests*** – Charitable organizations should template simple bequest language for donors to include in their wills.
- ***Pooled Income Funds*** – This type of donation comes from co-mingled funds of numerous donors. The interest earnings of the fund are allocated to various charities according to the pro rate shares of each donor. Each member of the co-mingled fund is required to execute a trust agreement. Upon the death of the donors, the value of the share is removed from the fund and transferred to the charity.

- *Other estate planning gifts* –Other estate planning gifts include charitable remainder gifts and life insurance trusts.

## **E. The Campaign Follow-Up**

Many charitable organizations have found that a proper follow-up to donations is the most frustrating, and often times the most misunderstood aspect of the “Asking” process. The follow-up does not merely entail a formal “Thank You”, but also a proper receipt that is recognizable by the IRS. As mentioned over and over, the beauty of the 501(c)(3) status is the ability of the individuals, organizations, and foundations to have a tax deduction for any funds contributed throughout a fiscal year. A charitable organization must have an understanding of the information needs of the donors for the tax purposes. Creating an efficient and effective follow-up process can easily make or break a donor’s decision to contribute next year.

The IRS does not require receipts for cash donations under \$250, but a charitable organization should treat each donor’s contributions in the same manner. The consistency of the process will make the internal operations of the organization more organized, as well as create a more respectful rapport with the donor. The IRS recommends that the donor keep a record of all donations, regardless of the size. If the donor were to be audited, then the process will be simplified because of the availability of necessary receipts.

Each receipt must contain certain information about the time and amount of the donation. The following is a list of requirements that each charitable organization should include in the receipts.

- Name of charitable organization.
- Name of donor.
- Amount of donation.
- Date of donation.
- Written acknowledgement from the organization of any property or services that may have been received in return for the donation, as well as an estimate of their value.

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## **VI. Bibliography**

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IRS Publication 4220

IRS Publication 557

Va. Code Ann. § 58.1-609.11

§ 58.1-609.11. Exemptions for nonprofit entities

FLETCHER-CYC § 79 (Charitable and benevolent organizations)

## **Web Sites**

Internal Revenue Services, [www.irs.gov](http://www.irs.gov)

<http://www.irs.gov/charities/index.html>

<http://165.176.249.145/site.cfm?alias=SUTExemption#NewFiling>

<http://www.state.va.us/>

[www.findlaw.com](http://www.findlaw.com)

Virginia Department of Taxation, [www.tax.virginia.gov/site](http://www.tax.virginia.gov/site)

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**CHAPTER 4: EMPLOYEES AND VOLUNTEERS**

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Summary

## I. Employment Laws

Below is a discussion of the laws that apply to employment issues. Most of these laws apply to employees only and would not apply to volunteers unless otherwise noted. While the majority of these laws are federal laws, it is important to check for any state or local laws that would apply. This is merely a brief summary of the coverage of these particular laws; it will be necessary to consult the laws directly to be sure you comply. It is also important to keep in mind that when it comes to most if not all of these laws, good business sense would seem to require that they be followed voluntarily (whether or not the organization falls under the statute).

### A. Federal Laws

#### **Title VII of the Civil Rights Act of 1964** (Title VII), 42 U.S.C. 2000e

- Applies to all private and government employers with fifteen (15) or more employees.
- Purpose: Prohibit discrimination based on race, color, religion, sex, or national origin.
- “It shall be unlawful ... for an employer
  - To fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of race, color, religion, sex, or national origin, or
  - To limit, segregate, or classify employees or applicants in any way which would deprive or tend to deprive any individual of employment opportunities because of race, color, religion, sex, or national origin.”
- Pregnancy Discrimination Act amended Title VII and provided that pregnant women must be treated as other employees on the basis of their ability or inability to work.
- This law includes a prohibition on harassment of employees.<sup>42</sup>

#### **Civil Rights Act of 1991**, 42 U.S.C. § 1981

- Applies to all private and government employers with fifteen (15) or more employees.
- Purpose: To provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace.

#### **Equal Pay Act of 1963** (EPA), 29 U.S.C. 206(d)

- Applies to all employers who are “covered enterprises” under the Fair Labor Standards Act because they are:
  - a federal, state, or local government agency;
  - a hospital or institution primarily engaged in the care of the sick, the aged, the mentally ill, or developmentally disabled who live on the premises;

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<sup>42</sup> See <http://www.eeoc.gov>

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- a pre-school, an elementary or secondary school, an institution of higher learning or a school for mentally or physically handicapped or gifted children; or
  - a organization/organization with annual dollar volume of sales or receipts in the amount of \$500,000 or more.
- Purpose: To protect men and women who perform substantially equal work in the same establishment from pay differentials based on sex.
  - “No employer ... shall discriminate ... between employees on the basis of sex by paying wages to employees ... at a rate less than the rate at which he pays wages to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”

\* For more information refer to [www.eeoc.gov](http://www.eeoc.gov).

### **Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621**

- Applies to employers with twenty (20) or more employees.
- Purpose: “Promote employment of older persons based on their ability rather than age and prohibit arbitrary age discrimination in employment.”
- “It shall be unlawful for an employer
  - To fail or refuse to hire or to discharge or otherwise discriminate ... with respect to compensation, terms, conditions, or privileges of employment, because of an individual’s age;
  - To limit, segregate, or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities because of such individual’s age; or
  - To reduce the wage rate of any employee in order to comply with this Act.”
- These prohibitions are limited to individuals who are at least forty (40) years of age.

\* For more information refer to [www.eeoc.gov/types/age.html](http://www.eeoc.gov/types/age.html).

### **Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101**

- Applies to all private and government employers with fifteen (15) or more employees.
- Purpose: “To provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”
- “No entity shall discriminate against a qualified individual with a disability because of the disability ... in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”
- Reasonable accommodations must be provided unless they will result in undue hardship on the employer.

\* For more information refer to [www.eeoc.gov/types/ada.html](http://www.eeoc.gov/types/ada.html).

**Vocational Rehabilitation Act of 1973, 29 U.S.C. 791**

- Applies to federal government contractors and subcontractors with contracts of \$10,000 or more and to employers receiving federal assistance.
- “No otherwise qualified individual with a disability ... shall, solely by reason of disability, be excluded from the participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

\* For more information refer to [www.eeoc.gov](http://www.eeoc.gov).

**Fair Labor Standards Act, 29 U.S.C. 201**

- Applies to all employers who are “covered enterprises” under the statute because they are:
  - a federal, state, or local government agency;
  - a hospital or institution primarily engaged in the care of the sick, the aged, the mentally ill, or developmentally disabled who live on the premises;
  - a pre-school, an elementary or secondary school, an institution of higher learning or a school for mentally or physically handicapped or gifted children; or
  - a organization/organization with annual dollar volume of sales or receipts in the amount of \$500,000 or more.
- Does not apply to independent contractors.
- Purpose: To remedy and eliminate labor conditions that are harmful to employees.
- Requires employers to pay minimum wage and overtime pay to employees and bars child labor.
- In addition, applies separately to employees of employers providing contract services to the United States.
- Some exemptions apply including an exemption for administrative, executive and professional employees.

\* For more information refer to [www.dol.gov/esa](http://www.dol.gov/esa).

**Immigration Reform and Control Act of 1986; 8 U.S.C. 1324(b)**

- Applies to employers with four (4) or more employees.
- Purpose: Ban intentional discrimination on the basis of citizenship or national origin.
- “It is an unfair employment practice for an entity to discriminate against any individual ... with respect to the hiring for or discharging of an individual from employment
  - Because of such individual’s national origin, or
  - Because of such individual’s citizenship status.”
- It is also an unfair employment practice to request documentation other than that required under 8 U.S.C. §1324a(b) if done for the purpose of with the intent of discriminating against an individual.



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\* For more information refer to <http://www.usda.gov/oce/oce/labor-affairs/ircasumm.htm>.

### **The Family and Medical Leave Act; 5 U.S.C. 6381**

- Applies to employers with fifty or more employees.
- Purpose: To provide eligible employees with the right to take unpaid leave.
- “An employee shall be entitled to a total of twelve (12) weeks of leave during any twelve (12) month period for one or more of the following:
  - Because of the birth of a child of the employee.
  - Because of the placement of a child with the employee for adoption or foster care.
  - In order to care for the spouse, child, or parent of the employee, if such spouse, child, or parent has a serious health condition.
  - Because of a serious health condition that makes the employee unable to perform the functions of the employee’s position.”

\* For more information refer to <http://www.dol.gov/esa/whd/fmla>.

### **Occupational Safety and Health Act, 29 U.S.C. 651**

- Applies to all employers.
- Purpose: to assure safe and healthful working conditions.
- “Each employer
  - Shall furnish to each employee employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees;
  - Shall comply with occupational safety and health standards promulgated under this Act.”
- Many states, including Virginia, voluntarily assume enforcement responsibilities for this Act. Please refer to the State and Local Laws section of this manual for details regarding Virginia’s OSHA program.

\* For more information refer to [www.osha.gov](http://www.osha.gov).

### **Volunteer Protection Act of 1997, 42 U.S.C. 14501**

- Purpose: “Promote the interests of social service program beneficiaries and taxpayers and sustain the availability of programs, nonprofit organizations, ... by reforming the laws to provide certain protections from liability abuses related to volunteers serving nonprofit organizations and governmental entities.”
- “No volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if—

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- the volunteer was acting within the scope of the volunteer’s responsibilities in the nonprofit organization ... at the time of the act or omission;
- if appropriate or required, the volunteer was properly licensed, certified, or authorized ... for the activities... in which the harm occurred...;
- the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; and
- the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to—
  - possess an operator’s license; or
  - maintain insurance.”

\* A more in depth explanation of this Act follows in the volunteer section.

### **Drug Free Workplace Act, 21 U.S.C. 1501**

- Requires federal grantees to certify that they maintain a drug-free workplace.
- Grantees must publish a statement (e.g., as part of a personnel policy or manual) that informs employees that the manufacture, distribution, possession or use of a controlled substance in the grantee's workplace is prohibited.
- Grantees must establish a drug-free awareness program to inform employees of the dangers of drug abuse in the workplace, the grantee's policy of maintaining a drug-free workplace, and any available drug rehabilitation and employee assistance programs.

\* For more information refer to <http://www.dol.gov/elaws/drugfree.htm>.

### **Employee Retirement Income Security Act, 29 U.S.C. 1001**

- Applies to any employment benefit plan.
- Purpose: “To encourage the maintenance and growth of single-employer defined benefit pension plans and increase the likelihood that participants and beneficiaries ... will receive their full benefits.”
- ERISA requires plans to provide participants with plan information including important information about plan features and funding; provides fiduciary responsibilities for those who manage and control plan assets; requires plans to establish a grievance and appeals process for participants to get benefits from their plans; and gives participants the right to sue for benefits and breaches of fiduciary duty.

\* For more information refer to <http://www.dol.gov/dol/topic/health-plans/erisa.htm>.

**Consolidated Omnibus Budget Reconciliation Act (COBRA), 29 U.S.C. 1161**

- Purpose: Continuation of health care for certain individuals.
- Applies to employers with twenty (20) or more employees.
- Requires that a group health plan sponsor shall provide “that each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event is entitled, under the plan, to elect ... continuation coverage,” at employee expense.
- A qualifying event includes death of the employee, termination of employment, divorce, etc.
- For more information refer to <http://www.dol.gov/dol/topic/health-plans/cobra.htm>.

**Federal Unemployment Tax Act, 26 U.S.C. 3301**

- Purpose: To provide payments to workers who have lost their jobs.
- Applies to nonprofit organizations with four (4) or more employees.
- Sets forth the rates of an excise tax to be paid by the employer.

**Federal Insurance Contributions Act (FICA), 26 U.S.C. 3101**

- Purpose: Old age, survivors, and disability insurance
- Applies to every individual and employer.
- Sets forth the rates of tax imposed on the income of the individual. Also sets forth the rates of an excise tax to be paid by every employer.

**B. State and Local Laws**

**Virginia Workers' Compensation Act, Va. Code §65.2**

- Applies to employers with three (3) or more employees.
- Purpose: To provide a no-fault remedy for workers who are hurt on the job.
- Employers must purchase and obtain workers' compensation insurance.
- Note: For nonprofits, unpaid officers are not considered employees.

\* Access the employer's guide at [http://www.vwc.state.va.us/employers\\_guide.htm](http://www.vwc.state.va.us/employers_guide.htm).

**Virginia Occupational Safety and Health Program**

- Purpose: To protect and promote the safety and health of Virginia's workers.
- For the most part, this program follows closely the federal OSHA guidelines but there are additional standards that are unique to Virginia.

\* For additional information refer to <http://www.doli.state.va.us/index.html>.

## Virginia Unemployment Compensation Act, Va. Code §60.2

- Works in conjunction with the Federal Unemployment Tax Act.
- Sets forth taxes to be paid by the employer.
- Va. Code §60.2 – 501 deals specifically with nonprofit organizations.
- For additional information refer to <http://www.vec.virginia.gov/vecportal/unins/insunemp.cfm>.

## II. Basic Employment Policies

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### A. Basic Legal Issues

When an organization has staff, it must develop employment policies. In the past employee policies were designed to provide user friendly information to employees about things like benefits and terms of employment; not a lot of thought was given to the need to protect employers.<sup>43</sup> Times have changed and personnel policies must be reviewed with the goal of protecting the employer from claims by employees that the policies create an employment contract. Obviously, organizations should consult with an employment law attorney if they are ever unsure of anything.

Employers are free under federal law and most state laws to design their workplace policies and procedures as they deem best for their situations. There are a few obvious exceptions when it comes to minimum wage and overtime pay, no illegal or discriminatory hiring/firing decisions, safety and OSHA regulations, etc. Actual policies adopted will vary from organization to organization and will depend to a large extent on size, number of employees, benefits offered, and other factors.<sup>44</sup>

Policies can be verbal, written, or both, but ideally all important policies should be in writing. Copies should be given to all employees; policies will do no good if no one is aware of them. Uninformed employees can also cause employers to lose unemployment compensation claims if they are unable to show that the claimant has been informed of the policies he or she violated. The policies are typically contained in a handbook format.

In most states policies or policy handbooks are not regarded as binding employment contracts. This is something the employer might want to explain to potential and current employees.<sup>45</sup> An example of the proper way to phrase this is contained in Appendix B.

Care needs to be taken, however, because in some states a contract can be created by using language that conveys rigid rules that must be followed exactly as written in all circumstances. Flexibility should be built into the wording to avoid making any promises that could be interpreted as a contract. Watch out for policies that state that the organization will “only” or

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<sup>43</sup> Online Women’s Business Center at [http://www.onlinewbc.gov/docs/manage/hrpol\\_idx.html](http://www.onlinewbc.gov/docs/manage/hrpol_idx.html)

<sup>44</sup> Id.

<sup>45</sup> Id.

“always” do something or “must” act in a particular way, one that describes employees as “permanent”, states that employees will be terminated only for “cause”, or makes promises of job security.<sup>46</sup>

One thing that must be shown in every discharge case is how the claimant either knew or should have known he or she could lose his job for the reason given; for example, if the policy in question talks about two verbal warnings, a written warning, a suspension and then discharge and the employee is fired after only two verbal warnings, the employer may lose the case, unless it can somehow be shown that a compelling reason existed for ignoring the policy in that particular employee’s case.<sup>47</sup>

## **B. Practical Issues**

Most employers put forth written policies as a means of setting forth their expectations for employee performance and conduct. The policies can also help to achieve consistency in treatment of employees. Some policies should be maintained in written form for legal reasons; for example, a sexual harassment policy and employee benefit plans. The Federal statute barring harassment only applies to employers with 15 or more employees, however.<sup>48</sup>

Many small employers simply rely upon occasional memoranda to employees to explain organization policy. This is not recommended because it is hard to track.

Again, although employers do have the right to change their policies at will, it may not be advisable to do so without at least attempting to give advance notice; if a policy change alters an employee’s work relationship so much and so adversely that a reasonable employee would quit under the circumstances, the employer could face a loss in an unemployment claim.

In addition to unemployment claims, employers could also encounter a loss in employee morale and productivity with ill advised or ill timed policy changes; employers should attempt to anticipate these potential problems and think of alternatives when considering policy changes.

It is critical for employers to try and follow their own policies as well, especially with respect to disciplinary matters. Enforcement of the policies must be even handed and consistent. Employers must also maintain proper documentation of performance problems to defend themselves effectively against employment claims. Poor and nonexistent documentation can severely undermine the defense of the employer.

For sample employment policies see Appendix, Chapter 4, [employmentpolicies](#)

For a sample handbook, see Appendix, Chapter 4, [samplehandbook](#)

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<sup>46</sup> Policy Writing and Updating: Myths and Truths at <http://www.instanthrpolicies.com/newdesign/policies.htm>.

<sup>47</sup> Wrongful Termination Claims at FindLaw.com at <http://employment.findlaw.com/employment/employment-employee-job-loss/employment-employee-wrongful-termination.html>.

<sup>48</sup> Employment Law-Free Advice at [http://employment-law.freeadvice.com/sexual\\_harassment/](http://employment-law.freeadvice.com/sexual_harassment/).

### C. Whistle-blowing Under the Sarbanes-Oxley Act

Retaliation claims can be easy for employees to bring and difficult and expensive for employers to defend. Establishing a claim under the Sarbanes-Oxley Act requires the following four elements; (1) participation in a protected activity by the employee (2) actual or constructive knowledge by the organization that the employee engaged in a protected activity (3) adverse employment action against the employee and (4) a showing that the protected activity was a contributing factor in the adverse employment action.<sup>49</sup>

The statutory definition of a “protected activity” is very broad. It covers both reports to government officials, reports to supervisors and participation in SEC or legal proceedings. Under the applicable case law, protected activity covers a wide range of conduct, including contacts with the news media.<sup>50</sup>

Any effective employment handbook will include a policy encouraging reporting of problems under the Act and the assurance of no retaliation. Most large organizations already have established procedures under the Act for anonymous receipt of employee complaints and concerns regarding accounting and audit matters. It is recommended that organizations consider additional steps they can take to avoid and respond effectively to retaliation claims under the Act.<sup>51</sup>

### D. Guidelines

The level of detail in a personnel policy should be sufficient to (i) advise employees of the employer’s expectations and the employee’s rights under the policy and (ii) guide managers seeking to enforce the employer’s rules.

Care should be taken to avoid excessive detail. Every personnel policy should include a policy on equal employment opportunities/nondiscrimination, and one on sexual and other unlawful harassment.<sup>52</sup>

## III. Staff Structure & Position Descriptions

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After formation of a Board of Directors for the organization, the process of fulfilling the mission can begin. As the needs of the community being served are identified and the network of resources grows, the addition of a staff member (Executive Director) to the organization may be required. This position usually develops because of the need to adequately meet the needs of the clients as well as the alleviate demands of time and resources placed on the board. Mature nonprofits may take years to develop. Over time, specialized staff may be necessary to assist in

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<sup>49</sup> Sarbanes Oxley at <http://www.sarbanes-oxley.com/>.

<sup>50</sup> Id.

<sup>51</sup> Id.

<sup>52</sup> Employee Handbooks That Work, January 12, 2005, at [http://www.fredlaw.com/articles/employment/empl\\_0501\\_rcb.html](http://www.fredlaw.com/articles/employment/empl_0501_rcb.html). See also: [www.eeoc.gov](http://www.eeoc.gov)

the mission. There is no magic formula to determine when to hire staff or how to organize staff. The nuances of the community and involvement of the board and volunteers will influence how this occurs.

See the Appendix for position descriptions. [jobdescriptions](#) The positions listed are a guide to developing staff roles and responsibilities. Please remember that initially all responsibilities would be housed in the position of Executive Director. The position descriptions are listed in order in which most organizations add staff. This is only a guide and an organization may find it necessary to make changes to the staff structure and position descriptions.

## **IV. Volunteers in Your Organization**

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### **A. Introduction**

Volunteers are generally people who perform services for or are otherwise employed by a nonprofit entity, and who either receive no compensation or do not receive anything of value in lieu of compensation in excess of \$500 per year. Volunteers are the “bread and butter” workforce of nonprofit organizations, and it is clear that everyone benefits from the nonprofit / volunteer relationship. For this reason, it is essential that you become skilled in recruiting and retaining this important element for your organization. However, it is equally true that volunteers can be a source of exposure to tort liability for organizations.

When actions of volunteers harm people—albeit unintentionally—organizations may very well have to pay for the consequences. A nonprofit group will not be relieved of liability simply because a person causing a liability is an uncompensated volunteer. Therefore, in order to make sure that balance is maintained between satisfying your organization’s resource needs and mitigating your organization’s exposure to risks—that is, in order to develop the degree of control over your volunteers that the law presumes to exist, but still manage to attract and motivate a beneficial volunteer workforce—the following policy guidelines for use of volunteers should be considered.

### **B. Addressing Risks to Prospective Volunteers**

Owing to our increasingly litigious society, it is important to address upfront the risks that prospective volunteers will face by volunteering with your organization. A significant impediment to volunteer recruiting is volunteers’ widespread fear of incurring unnecessary personal liability for their participation. Fortunately, helpful federal authority is available for you to communicate to recruits in hopes of assuaging their fears—and thereby persuading participation from quality workers.

As was noted in an earlier section, the Volunteer Protection Act (the “Act”)<sup>53</sup> was enacted on June 18, 1997, and was designed to establish uniform protections for volunteers nationwide. It was enacted in response to the withdrawal of volunteers from service to nonprofit organizations

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<sup>53</sup> See 42 U.S.C. §§ 14501 et seq. (2005).

owing to concerns about possible liability, and provides certain protections to volunteers of nonprofit organizations—including directors, officers, and volunteer workers—from liability for harm caused by ordinary negligence. Specifically, the Act states that no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission if the following prerequisites are satisfied: (i) the volunteer was acting within the scope of his/her responsibilities at the time of the act or omission; (ii) the volunteer was properly licensed or certified, if necessary; (iii) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct or a conscious, flagrant indifference to the rights and safety of the person harmed; and (iv) the harm was not caused by the volunteer’s operation of a vehicle for which the state requires the owner or operator to possess an operators license or maintain insurance. The Act also prohibits the recovery of punitive damages against volunteers acting within the scope of their volunteer responsibilities unless the conduct was willful, criminal, or in conscious flagrant indifference to the rights and safety of the claimant.

You should feel free to hand out a copy of the Act to inform recruits of their rights and responsibilities. A copy of the Act in handout form is available in this section’s appendix, *infra* [VolunteerProtectionAct](#) Informing recruits that, generally, they will be protected from personal liability as long as they act within the scope of their responsibilities (notably, the next section addresses defining responsibilities for volunteers) is an effective recruiting tool.

It is also important to inform volunteers of the Act’s limitations. The Act does not protect a volunteer from liability arising from actions of willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious indifference to the rights or safety of the harmed individual. The Act also does not protect a volunteer from liability arising from criminal acts, hate crimes, sexual offenses, violations of state or federal civil rights law, or when the volunteer was under the influence of drugs or alcohol. Establishing these boundaries will go a long way towards setting expectations of your volunteers and ensuring that all workers fully understand their rights and responsibilities under the law.

## **C. Addressing Risks to the Organization**

### ***Guidelines for Successful Management***

Notably, nothing in the Volunteer Protection Act can be construed to affect the liability of any nonprofit *organization* with respect to harm caused to any person by an organization’s volunteers. When faced with a suit against an organization for an alleged injury caused by a volunteer, courts in jurisdictions without charitable immunity have applied the traditional doctrine of respondent superior, a legal doctrine which dictates that the master is liable for torts committed by the servant, regardless of the fault of the master. The message of the application of respondent superior doctrine to the torts of volunteers is that organizations must find ways of properly controlling the behavior of volunteers in order to reduce the chances of tort liability. It is crucial, therefore, that your organization understands that it must take care to manage its volunteer workforce—both for mitigating liability to the organization as well as ensuring organizational excellence and success. Attention needs to be paid to the recruitment, selection, training, evaluation, and management of volunteers. Though volunteers can be tremendous assets to any organization, they also present new human resources management challenges. Your nonprofit organization can be held liable for improper selection, assignment, training, and



supervision of volunteers, and, of course, for failure to act upon notice of some wrongdoing or inadequacy of a volunteer. For these reasons, management guidelines should be considered for recruiting and managing volunteer workers.

To protect your organization's clients, reputation, and staff, you should establish a basic screening process for volunteers that reduces risk. All applicants should be subject to the following:

- Application review.
- Interview and reference checks—even if the applicant is the board chair's nephew or the Mayor's sister!
- Depending on the position requirements (established in the position description), your screening process might include verification of licensure or educational credentials. This is especially relevant when screening prospective members of the Virginia Bar.

A general guideline for screening volunteers is that the more vulnerable the service recipient and the greater the opportunity for violations of trust, the more intensive the screening process should be. When initially planning to use volunteers, ask yourself:

- Do all volunteer positions have formal descriptions that describe the essential duties of each position?
  - Are all applicants for volunteer positions subject to a basic screening process consisting of:
    - An application?
    - A face-to-face interview and reference checks?
- Has the organization assessed all volunteer positions by the degree of risk posed? Is each group of positions subject to an appropriate screening process?

Consider these questions when developing volunteer positions and position guides:

- What are the characteristics, strengths, and needs of the target population?
- What qualifications will volunteers need in order to serve this population effectively through the program?
- What are the preferences of the target population regarding service delivery by paid staff or volunteers?
- How do the possible volunteer positions relate to the overall mission of the agency?

As you consider your volunteer needs, be aware that “existing employee” relationships with volunteers are critical. Often there is tension between employees and volunteers—for example,

when employees resent organizational “outsiders.” To eliminate this tension, plans for volunteer staffing should be developed in two distinct phases. First, the organization should examine the tasks that might best be performed by volunteer staff in light of the organization’s mission, structure, and personnel policies. Second, specific volunteer positions and position guides need to be developed. This step should involve the participation of board members, union leaders, paid staff, direct service volunteers, and clients. It serves to encourage broad support for the volunteer program, as well as to ensure that the creation of volunteer jobs balances the needs of clients, paid staff, and volunteers.

Before applications are solicited for a volunteer need, each volunteer assignment should have a clear and concise written position description. The position description clarifies—for the applicant and the nonprofit—the nature of the assignment, the expectations, the prohibitions, and the consequences. Position descriptions should be developed long before the first prospective volunteer appears for an interview. The document will clarify whom to report to, the time commitment, and other general matters regarding your organization. It will focus selection on the qualifications for the position, serve as a tool to choose the proper level of screening for the risks associated with that position, and establish limitations and barriers that may discourage undesirable individuals from infiltrating the program. See Example B in this section’s appendix, *infra*, for a basic example. volunteerpositiondescription

Unlike paid staff, who typically initiate the employment process themselves, volunteers need to be actively recruited. Communication is the key to finding volunteers. People need to know that the agency is looking for and receptive to volunteers. Word of mouth referrals from other volunteers or paid staff, newspaper articles and advertisements, radio and television spots, presentations before community or professional groups, and tapping relatives and friends of clients have proved to be successful methods for recruiting volunteers.

To match volunteer applicants with volunteer position descriptions, applicants should provide information about their skills and experience. A volunteer application form provides a uniform method for gathering such information. See Example C in this section’s appendix, *infra*. volunteerapplication To reduce your organization’s risk, the application form should include a disclaimer that makes it clear that completion of the application in no way guarantees a volunteer position with the nonprofit. See Example D. volunteerdisclaimer

When considering prospective volunteers, you should be as selective as possible in your “hiring.” No nonprofit has an unlimited number of positions to fill. Just as a nonprofit that takes on too many activities unrelated to their core mission risks losing sight of its core constituency and purpose, a nonprofit that tries to place every person seeking a volunteer opportunity runs the risk of taking on volunteers who are unsuitable or incompatible with the organization's needs. Moreover, the nonprofit may be accepting volunteers that it cannot properly supervise.

Use face-to-face interviews when selecting volunteers. The interview is an opportunity to compare your requirements with the talents and interests of persons seeking volunteer positions in your organization. Questions will vary from one position to the next. Prepared questions help keep the interview focused, discourage reliance on memory, and provide standard information for evaluation.

The temperament, education, and skills, as well as the criminal background of each volunteer bear investigation. Nonprofits have a duty to exercise care in managing their volunteers, particularly when they will interact with the public. It is worth noting, however, that you must also be sensitive to the privacy concerns of your recruits—so it is essential that you maintain balance between performing necessary due diligence and respecting privacy rights. You should investigate the good standing of all legal volunteers with the Virginia State Bar (Attorney Records Search: <http://www.vsb.org/attorney/attSearch.asp>). Additionally, you should always perform background criminal and credit checks on volunteers placed into sensitive or fiduciary duties. Also, when the situation requires it, you should inquire into the driving record of prospective applicants. Finally, you should ask for employment references and should contact the proffered individuals. A few very basic questions to ask references are included in [Example E. volunteerreferencequestions](#)

Document your actions in screening volunteers! It is difficult to overstate the importance of documenting your volunteer screening and placement activities. Keep written records and documents, for you must be able to later prove—sometimes years later—that you undertook appropriate due diligence of volunteer workers.

It is worth noting that the degree and rigor involved in screening prospective volunteers should be tied to the nature of the position recruited. That is, while a long-tenure attorney/client advocate volunteer position may warrant extensive screening procedures, intensive screening for “one time” or “event specific” volunteer positions—for example, telethon operators—likely would not make practical sense. The intensity of appropriate due diligence is a judgment call, determined by the requirements of your situation.

Proper training is an important step toward assuring safe activities and controlling the volunteer's actions. Training starts with making sure that a volunteer knows what is expected. Generally, volunteers want to meet the high standards set by your volunteer program. To help them do so, you must provide explicit direction about what you expect and what is required to volunteer in your program—e.g. direction regarding time commitments (minimum and maximum), briefings to attend, reports to submit, and other organizational procedures. You should also give volunteers a copy of their position description (which you drafted when soliciting the position, as noted above) so that they know exactly what responsibilities and obligations their duties entail. To minimize the frequency and severity of mistakes, volunteers need to receive general training concerning the agency's mission, policies, and regulations, as well as training that is tailored to the specialized tasks or responsibilities that they will perform.

You also need to spell out what's forbidden in your organization—even if you are uncomfortable discussing the topic. Discuss all prohibited behaviors. Describe the organization's policies on drugs/alcohol, sexual harassment, intra-organizational romances, and any other prohibited behaviors. You should emphasize that prohibited behaviors and their consequences apply to all staff regardless of pay status.

Make volunteers aware of the implications that staff performance—both paid and unpaid workers—has on clients, stakeholders, and members of the public. Explain what the volunteer's

role is in maintaining the public's trust, and how the way in which clients, stakeholders, and the public are treated reflects on the organization, overall.

Communicate what volunteers can expect from your organization. Where appropriate, volunteers need to know that the organization has a grievance process and that issues related to assignments or working conditions can be brought to the attention of the director of volunteers or another organization executive who is willing to work with volunteers to resolve problems.

Every new volunteer should be issued a “new volunteer pamphlet” providing basic information on the organization. Formal volunteer orientations and volunteer handbooks help introduce and reinforce what to do, what not to do, who to report to, how to handle a crisis or grievance—crucial considerations when most of your volunteers are new. Some items to include in your pamphlet include:

- Mission and history of the organization
- Description of essential programs
- Review of relevant information from the volunteer orientation
- Overview of volunteer screening process
- Expectations of volunteers and/or code of conduct
- Prohibited behavior/conduct
- Grievance policy for volunteers
- Operational guidance—that is, who to contact if volunteers are unable to make it to their assignments, who to speak to if they have questions about their positions, etc.

Volunteers should be supervised and managed like any other organizational employee. Note: supervising volunteers may be more problematic than supervising compensated employees because of the reduced impact of the threat of termination, the lack of the "gratitude factor" of non-compensated employees (i.e. volunteers may feel that they are owed more leniency since they are not compensated), and the variability of volunteers' time schedules and work sites. Nonetheless, proper supervision of volunteers will ensure that your organization continues to successfully meet its obligations to its clients.

Do not be reticent about discussing performance and behavioral expectations with your volunteers. Tolerating inappropriate or unsatisfactory behavior can drain a nonprofit's resources when, in fact, the involvement of volunteers is meant to maximize resources. When an organization addresses problematic situations, its staff and volunteers will be relieved and gratified. When organizations expect a certain level of performance from volunteers and establish standards of accountability, the attitude of the volunteers is affected. Rather than viewing the quality of their work as unimportant, volunteers feel responsible for their activities and take pride in their work. The result of this effort by management is that volunteers are more careful and thus less likely to perform negligently.

A schedule should be developed so that performance evaluations take place at regular intervals. The primary purposes of evaluation should be to provide feedback and to develop volunteers. Sometimes, however, a volunteer does not meet the agency's expectations. Should this occur, the following steps be taken:

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- Re-supervise - You may have volunteers who do not understand the policies of the organization, or they may be testing the rules to see what can be expected.
- Reassign - Move volunteers to different positions. The volunteer coordinator may have misread the volunteer's skills, or the volunteer may not be getting along with paid staff or fellow volunteers.
- Retrain - Send the volunteers back for a second training program. Some people take longer to learn new techniques. Do not let the lack of knowledge lead you to believe that new volunteers are not motivated.
- Revitalize - Longtime volunteers may need a rest. They may not be aware that they are burned out.
- Refer - Refer volunteers to other agencies more appropriate to their needs.
- Retire - Allow longtime volunteers the dignity to resign.

Another important component of monitoring volunteer performance is recognizing excellent service to your organization.

- Thank your volunteers promptly - Send thank-you letters or emails within two weeks of an event or project being completed, when the experience is still fresh in volunteers' minds. It is impossible to say thank you too much or too often.
- Choose who to recognize and why with utmost care - The value of recognition may be diminished if it is given out to too many people for different levels of achievement. A simple oral "thank you" to individuals and groups whose efforts are too small to warrant a substantial recognition symbol is appropriate.
- Promote peer group recognition - This can be the greatest reward, and asking a recognized volunteer to talk about his/her achievements to other branches or at public events can instill a great sense of pride.
- The best rewards are often non-financial - If money is offered, it could be given as a donation to the charity of the individual's or group's choice. Here are a few alternative suggestions:
  - **Praise:** Recognize volunteers by offering small gifts, a recognition spot on your web site or in your newsletter, or public recognition at an event. Volunteers may also appreciate a letter thanking their boss, teacher, family, etc. for their help and/or a reference letter for a job or another volunteer position.
  - **Affiliation:** Thank volunteers through social get-togethers, organization t-shirts, name-badges, or posting a list of all organization volunteers in a public area.

- **Accomplishment:** You can offer volunteers certificates of accomplishment at specific stages in their work, continuing education, or credential credits.
- **Power and Influence:** Volunteers may appreciate titles or rank insignia, a special parking spot for the month, or involvement as a speaker at organization workshops.

A nonprofit that provides minimal or no direction to its volunteers and relies solely on volunteers' personal judgment may be successful in claiming that volunteers who caused harm were acting on their own, and not on the nonprofit's behalf. However, it is also true that volunteers who receive minimal training, supervision and guidance are more likely to act in a way that is contrary to the intentions of the nonprofit—and in most cases these actions may result in harm that the nonprofit could have avoided had it exercised greater care. It is for these reasons that close supervision and direction of volunteer workers is essential.

Supervision strategies should be developed that reflect the nature of the organization, the type of service to be performed, the resources available to the nonprofit, and the background, skills, and capabilities of the volunteers serving the organization. Essentially, you should manage and treat your volunteer workers the same as other paid staff.

As part of your ongoing volunteer training, you should define your expectations of Internet usage by your volunteer workers. This might include descriptions of acceptable and unacceptable content of e-mail and Web sites; how to handle errors, such as mistakenly forwarding harassing or racially derogatory jokes or locating a pornographic Web site; and consequences when these guidelines are breached.

An organization's pool of volunteer workers should be examined periodically to make sure that resources are appropriately matched with needs. All volunteers should maintain up-to-date records, which should be reviewed annually by a director. Make sure that you maintain up-to-date documentation of licensures and certifications—especially Virginia Bar membership. Additionally, periodically revisiting training through annual refresher orientations, skill upgrades, or training sessions can expand your volunteer pool's skill set and maintain current credentials.

Boards should play key roles in ongoing support of volunteer programs. Board members should expect reports on volunteer involvement, schedule time to discuss volunteers, refer volunteer candidates to the agency, participate in recruitment, and take part in volunteer recognition events. It is important that you remind board members that they, themselves, are volunteers despite their legal and fiduciary responsibilities, and attempts should be made to occasionally personally link board members and direct-service volunteers.

Additionally, organizations that have volunteer programs must decide whether they need to add a position such as a volunteer coordinator to administer the volunteer program or if existing employees can assume the responsibilities. Major program management responsibilities include the following:

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- Obtaining and maintaining support for the volunteer program.
- Developing, monitoring, and evaluating the volunteer program budget.
- Keeping key officials informed about the scope of volunteer services.
- Establishing and monitoring program goals.
- Assigning volunteer responsibilities and monitoring results.
- Recommending policy changes or action steps to top management to maintain, improve, or expand the volunteer effort.

Make sure that your organization invests in adequate insurance to cover volunteer mishaps. While insurance is not *required* and usually does not safeguard volunteer program participants, per se, but it *can* help pay for insured losses and the cost of investigating or defending allegations of wrongdoing—for example, claims filed against the nonprofit that result from harm or loss suffered by volunteer workers while providing service for the organization or loss caused by volunteers while performing their service.

Unfortunately, insurance companies are reluctant to cover volunteers, believing that organizations do not control volunteers, that volunteers are not effectively screened or trained, that volunteers may not be motivated to succeed in their assignments, and that volunteers are inadequately supervised. As a result of these perceptions, volunteers are either excluded from many liability policies or are assigned to high-risk rate categories—and most organizations are charged correspondingly high premiums for coverage.

You should also make sure that all attorney volunteers carry adequate malpractice insurance. Attorneys should produce copies of their coverage. You should be prepared, however, to fund malpractice policies yourself if your situation demands it.

## Summary

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Volunteers have become an integral part of nonprofit organizations. Volunteers are an attractive resource for organizations because they cost little, can give detailed attention to people for whom paid employees do not always have the time, often provide specialized skills, provide an expansion of staff in emergencies and peak load periods, enable organizations to expand levels of service despite budgetary limitations, and are good for public relations. Though volunteers can be tremendous assets to any organization, they also present new human resources management challenges. But by considering the guidelines listed here, an organization should be adequately prepared to successfully integrate volunteers into the organization—thereby facilitating entity goals and public service while providing valuable opportunities for personal and professional growth.

\*For additional information regarding countless aspects of using volunteers in your organization, please visit the free online library of Energize, Inc., an international training, consulting and publishing firm specializing in volunteerism: <http://www.energizeinc.com/art.html>.

## CHAPTER 5: OPERATIONS AND GOVERNANCE

*What are the legal and ethical obligations of the Board? How should they comply?*

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## I. Operations and Governance: A Checklist

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- \_\_\_\_\_ Develop and implement a conflict of interest policy and reporting procedure for Board of Directors and staff.
- \_\_\_\_\_ Develop and implement a privacy/ confidentiality policy for nonpublic personal information.
- \_\_\_\_\_ Compose a policies and procedures manual including the organization's overall objectives and goals, including the mission statement, financial plan, investment plan, operations, personnel and budget.
- \_\_\_\_\_ Create an orientation packet for board members and staff including important information about the policies, organization, and information on the legal and ethical responsibilities of board members and staff.
- \_\_\_\_\_ Revise policies and procedures as needed.
- \_\_\_\_\_ Hire an executive director and monitor her performance.
- \_\_\_\_\_ Appoint committees and/ or hire professionals to handle special functions of the organization, such as fundraising, public relations and finance.
- \_\_\_\_\_ Comply with record-keeping requirements for tax purposes and with reporting and disclosure requirements.

Recently, nonprofit operations and governance or stewardship (i.e., the way organizations function) have captured the attention of both the public and the media. Specifically, public scrutiny has been focused on the *failure* of organizational governance. Failed stewardship may lead to the demise of an organization, unemployment, and financial loss for workers. Additionally, the *way* in which some Boards of Directors choose to govern nonprofit agencies may present other problems that include; role confusion amongst board members, lack of board accountability, inaccessibility of board members and limited or no access to information.

The purpose of this section is to outline and address some of these problems and to recommend ways in which nonprofit entities can structure their operations and governance practices in a more effective manner. Topics to be covered include conflict of interest, legal ethics, confidentiality, and board duties such as loyalty and care, drafting appropriate policies for each; identifying any necessary record-keeping and reporting requirements, and drafting appropriate guidelines.

## II. Conflicts Of Interest

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Businesses operating under the watchful eye of the general public are subject to high levels of scrutiny. Just as private and publicly-traded for-profit companies have reformed their business

practices, not-for-profits have a similar obligation to conform to these accepted norms of operation. A successful business plan requires that appropriate policies are in place to mitigate conflicts of interest. Additionally, a comprehensive policy and sound procedure is reassuring to potential donors and could lead to greater confidence from your nonprofit's constituent-base. Any suspicion of self-dealing or benefits to insiders could be disastrous to your ability to elicit confidence from the community and, more importantly, from the donor base and grant-making entities that are the lifeblood of the organization.

In a small nonprofit, there are three primary conflicts that must be included in any plan. First, there are potential conflicts for board members that are in a position to derive a business gain through their role on the board. Second, there is a similar concern for employees who have significant decision-making authority over your organization. Finally, there is the ethical duty of volunteer and staff attorneys to comply with the Rules of Professional Conduct to ensure that conflicts of interest are handled in an appropriate manner.

### **A. Board Member, Director, and Officer Conflicts**

Although smaller nonprofits will not face the same types of conflicts as larger nonprofits by virtue of size, scope, and geography, appropriate provisions must be in place to ensure transparency of operations for stakeholders and constituents. The pool of qualified potential board members will likely consist of local business leaders, professionals, and affected clients devoted to the work of the nonprofit. Small organizations in relatively small geographic areas may grow in the future as the needs of the organization's constituency change. The adoption of appropriate policies from the onset will allow seamless future expansion. A Sample conflict of interest policy is provided in the Appendix. [conflict of interest policy](#) Also see the sample conflict of interest statement for disclosure of conflicts. [conflict of interest statement](#)

In addition to sharing the conflicts encountered by large, for-profit organizations, such as issues of self-dealing and conflicts involving unfair gains as a result of being a board member, nonprofit board members face an additional potential conflict. Because of the limited number of interested and qualified persons in the community able to serve on the boards of nonprofits, there may be a "duality of interests" for individual board members.<sup>54</sup> There is the potential for conflicts when making decisions that require a balancing of interests between two organizations that a board member serves.<sup>55</sup> If the board is called to make the decision whether to engage in activities that would affect both organizations, the conflicted board member should recuse herself from all decisions involving the conflicting organization.

### **B. The Business Judgment Rule**

Generally, board members, directors, and officers are all bound by the "business judgment rule."<sup>56</sup> This "rule" requires that decisions be made "(i) in good faith and without a conflict of interest; (ii) on a reasonably informed basis; and (iii) with a rational belief (connoting broad

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<sup>54</sup> VICTOR FUTTER, NONPROFIT GOVERNANCE AND MANAGEMENT 192-193 (2002).

<sup>55</sup> Id. at 193.

<sup>56</sup> Harvey J. Goldschmid, The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms, 23 Iowa J. Corp. L. 631, 643-44 (Summer 1998).

discretion and wide latitude) that the business judgment is in the best interests of the organization.”<sup>57</sup> The duty to avoid conflicts of interest should guide all decision-making by your organization’s leadership.

Adopting a comprehensive policy and conflict reporting procedure will permit issues regarding duality of interest and self-dealing to be reviewed on an annual basis. Self-dealing for smaller nonprofits is most likely to arise in the context of small business owners serving on the board of the nonprofit. For example, a board member who owns a local printing organization should be recused from any decisions or discussion where the services of her business are considered for use by the nonprofit. Likewise, a local banker on the board is conflicted out of any discussions related to any financial transactions or activities that involve his bank. This is not to say that these individuals cannot benefit from the activities of the organization, but any activities that could result in a financial gain for the board member or officer cannot be the result of the board members’ involvement in the actual discussion or decision-making. In the context of larger nonprofit organization, there are additional self-dealing issues that don’t arise immediately for smaller organization.

Just as there is great potential for conflicts for board members, similar concerns arise for staff with significant responsibility and decision-making authority for your organization. In the event that a staff member conflict is discovered, it is essential for that employee to recuse herself from any discussions or decisions involving the issue that gave rise to the conflict.<sup>58</sup>

### **C. Attorney Conflicts**

Attorneys working for a nonprofit legal service providers are bound by the same conflict of interest regulations as all attorneys. Under the American Bar Association (ABA) Model Rules of Professional Conduct, “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.”<sup>59</sup> In practical terms, the duty of the attorney is to limit representation of a new client if that representation would adversely affect another current client.<sup>60</sup> The lawyer must also avoid representation that could potentially lead to any material limitations on her duties to another client.<sup>61</sup> Although conflicts can be overcome by informed, written consent from the affected clients, the general rule is for lawyers to avoid conflicts if possible.

Legal service providers are in a unique position vis-à-vis the traditional conflicts rules. The provision of legal services by legal services organizations is often the last hope many low-income clients have for the resolution of their situation. When a legal services client is denied representation due to a conflict of interest, he is often left without any other form of representation.<sup>62</sup> It is also important to note that the types of conflicts that most often lead to the

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<sup>57</sup> Id. (citing 1-2 American Law Institute, Principles of Corporate Governance: Analysis and Recommendations (1994)).

<sup>58</sup> Id. at 194.

<sup>59</sup> ABA Model Rules, Rule 1.7 (2005).

<sup>60</sup> Id.

<sup>61</sup> Id.

<sup>62</sup> David H. Taylor, Conflicts Of Interest And The Indigent Client: Barring The Door To The Last Lawyer In Town, 37 Ariz. L. Rev. 577, 579 (1995).

denial of representation do not involve any real prejudice to the client.<sup>63</sup> Nonprofits must carefully determine whether or not there is a true conflict before deciding that continued representation would result in a conflict of interest.

Under the Virginia Rules of Professional Conduct, modeled after the ABA Model Rules, lawyers have a duty to maintain a level of loyalty and trust with their clients not only during representation, but also once that representation is complete.<sup>64</sup> The types of conflicts that most often arise involve parties whose interests are contrary to one another. The most obvious example arises in divorce proceedings where both parties to the suit cannot be represented by the same counsel. Such a situation is relevant for a nonprofit legal services provider that serves diverse client needs.

If the attorney has received any privileged information from either party, he is limited in his ability to represent the conflicted client.<sup>65</sup> The more likely scenario for a client of a nonprofit providing legal services, however, involves the potential for conflict between various clients served by the NPO. In the event that a network attorney represents an adverse party to litigation, perhaps even unrelated to the legal services provided to NPO clients, that attorney must either ensure she either defers the representation to another network attorney, or receives informed, written consent to proceed in the representation. Absent this consent, it is essential that both the network attorney and NPO personnel enforce a strict policy of conflict avoidance in order to evade any questions regarding the provision of legal services and the ethical obligations network attorneys have to the Virginia State Bar.

#### **D. Conflict Procedures**

Policies must be implemented to ensure that conflicts are efficiently resolved and that the business records of the organization reflect this resolution. When board members face a conflict, the appropriate response procedure is for the board member to inform the board of the conflict. The minutes should reflect the disclosure of the conflict and the conflicted board member should recuse herself from the continued discussion regarding the particular issue that gave rise to the conflict. When a vote is taken on the particular matter, the minutes should again reflect the abstention of the conflicted board member from that particular decision. Furthermore, it is essential to maintain records of conflicts by implementing an annual disclosure of conflicts for all board members, officers, and directors. The maintenance of these records ensures that in the event that a decision is called to question by interested parties, the NPO can verify that the conflict was mitigated by a policy that ensured the conflicted board member did not take part in the decision.

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<sup>63</sup> Id.

<sup>64</sup> Virginia Rules of Professional Conduct, Rule 1.7 (2005).

<sup>65</sup> Id.

Review of procedures upon discovery of a conflict for board members, officers, and directors:

1. Disclosure of conflict
2. Recusal from discussion
3. Abstention from voting
4. Recording in the minutes
5. Annual reporting of all conflicts

For attorneys who volunteer with legal nonprofit organizations, additional considerations apply. Since attorneys are bound by the ABA Model Rules (as discussed above and below under “Legal Ethics”), it is essential for attorneys to maintain appropriate records of all pro bono work conducted through the legal services provider along with other paying clients. If the attorneys fail to check for conflicts with their existing clients before undertaking representation of the nonprofit’s clients, they run the risk of disciplinary action from the Virginia State Bar. For a sample conflicts screening form, see Appendix, Chapter 5, [conflictsscreeningform](#)

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### **III. Legal Ethics**

Almost all nonprofit organizations will be involved with attorneys at one point during their existence. Some may only need an attorney to help form and begin running the organization; some may need an attorney to act as in-house counsel for the organization itself. Others may ask attorneys to serve on their boards of directors, while still others may actually provide legal services to their constituents or others in the community through either staff or outside attorneys.

The following section on legal ethics addresses several issues that concern attorneys specifically. It is divided between those ordinary nonprofit organizations and those that provide legal services. Those that do provide legal services may be further distinguished between staff attorneys and network attorneys. Please note, however, that those nonprofit organizations that do provide legal services should also read those sections for ordinary nonprofit organizations as they most likely are relevant to all nonprofit organizations.

Also, it is important to note that throughout this section, references are made to the American Bar Association (ABA) Model Rules of Professional Conduct. These are rules that the ABA has established as examples for states to follow in enacting their own legal ethics rules. While most states have adopted provisions similar to those of the ABA, some have made changes or additions to the rules, while others have not adopted certain rules at all. The nonprofit organization must check with its incorporating state to see which provisions apply and in what way these rules effect the organization. For the relevant rules from the ABA Model Rules, see Appendix, Chapter 5, [ABAModelRules](#) .

When a nonprofit organization needs pro bono attorneys to carry out its mission, it may be advantageous to know the following. Under ABA Model Rule of Professional Conduct 6.1, each

attorney should spend 50 hours per year on pro bono work. Therefore, making sure that the attorneys understand that their work will be considered pro bono may entice those attorneys who feel an ethical obligation to meet this standard. Such a rule encourages attorneys to help create a nonprofit organization or agree to represent it in any transactions or potential claims.

For those nonprofit organizations providing legal services, there is also an ethical obligation for attorneys to help those organizations. Besides encouraging attorneys to dedicate 50 hours to pro bono service, ABA Model Rule of Professional Conduct 6.3 encourages attorneys to support and participate in legal services organizations.

## **A. Ordinary Nonprofit Organizations**

Attorneys have a duty to keep certain information private either through the duty of confidentiality or the attorney-client privilege. The difference between the two will not be elaborated here, but the duty of confidentiality includes everything that the attorney-client privilege protects.<sup>66</sup> The duty of confidentiality is an attorney and his firm's obligation to keep certain information related to the client's representation secret unless the client consents to the disclosure or certain exceptions are met. This duty applies not only to matters communicated in confidence by the client, but also to all other information gained in the professional relationship that the client does not want to be revealed or the disclosure of which would be embarrassing or detrimental to the client. This duty begins with confidential information revealed by a prospective client and continues even after the attorney-client relationship has ended.<sup>67</sup>

For an attorney who represents the nonprofit organization itself as in-house counsel, the duty covers communications between the attorney and any high-ranking corporate official. The only time it will cover communications with a normal employee is when three conditions are all met: (1) the employee's superior directs him to speak with the attorney; (2) the employee knows the attorney is trying to obtain legal information for the organization; and (3) the subject of the communication concerns the employee's duties to act for the organization.<sup>68</sup> Therefore, a nonprofit organization should inform its employees that the attorney owes no duty of confidentiality to them unless these three conditions are present.

Besides serving as in-house counsel or external counsel, an attorney may serve as a director of the nonprofit organization. When the attorney is acting as a director, he owes the same duties to the organization as any other director. As such, he should advise the board of directors that in some circumstances, the duty of confidentiality and attorney-client privilege will not cover conversations in board meetings where he is present in his capacity as a director.<sup>69</sup> Therefore, if there is anything another director wishes to remain confidential, he should either disclose it to the attorney outside the board meeting when the attorney is serving in his position as the organization's attorney or go into executive session where the attorney would serve in his legal capacity instead of as a director.

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<sup>66</sup> ABA Model Rule of Professional Conduct 1.6 (2003).

<sup>67</sup> ABA Model Rule of Professional Conduct 1.18 (2002). If the information learned from a prospective client is public knowledge and does not deserve confidentiality, then no duty exists.

<sup>68</sup> *Upjohn v. United States*, 449 U.S. 383, 394 (1981).

<sup>69</sup> Comment 35 to ABA Model Rule of Professional Conduct 1.7 (2002).

Certain considerations must be taken into account; however, if the board opts for the second alternative. A third party may only be present if he will help further the attorney-client relationship. For example, the board of directors may have the organization's accountant present to help explain the organization's financial records, and the attorney-client privilege will still exist. However, where the presence of a third party does not further the relationship, the attorney-client privilege will not exist.

For the text of the confidentiality rules from the Virginia Code of Professional Responsibility, see Appendix, Chapter 5, [VAattyconfidentialityrules](#)

## **B. Nonprofit Organizations Providing Legal Services**

### **i. Conflicts of Interest**

Nonprofit organizations providing legal services must differentiate between staff and network attorneys for the conflict of interest rules. Staff attorneys are those that the organization hires to represent its constituents. Network attorneys are those on the organization's referral list that may offer their legal services at discounted rates or for free.

What creates a conflict of interest can sometimes be complicated but those most important to a nonprofit organization providing legal services will be discussed here. Imputed disqualification is the most basic consideration concerning such organizations. This means that if one attorney is disqualified because of a conflict, then all the attorneys in his firm are also disqualified. The key word in this statement is "firm," so it is important to discuss what constitutes a firm. There are generally five factors that determine whether a group of attorneys constitute a firm: (1) a formal agreement among the attorneys exists; (2) the attorneys hold themselves out as a firm; (3) they share revenues and responsibilities; (4) they share physical access to each other's files; and (5) they routinely talk among themselves about legal matters.<sup>70</sup> These factors are important to a nonprofit organization because a question arises whether a conflict with a network attorney disqualifies the organization or whether a referral to a network attorney creates a duty of loyalty between that client and the organization.

As to the first question, network attorneys are not members of the nonprofit organization or its internal "firm" for purposes of imputed disqualification. However, if the network attorneys work physically inside the nonprofit organization's building a problem will arise, specifically to factors 2, 4, and 5. Therefore, if an organization has a limited number of network attorneys, it may want to insure that they work in their own offices outside the organization's building so that the organization's staff attorneys are not disqualified due to conflicts with the network attorneys.

Once a referral is made to a network attorney outside the organization and outside the organization's building, that person becomes a client of the network attorney for the purpose of future conflicts of interest.<sup>71</sup> It is still important though that the organization obtain the client's informed, written consent to disclosure of the limited information given at an intake interview in

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<sup>70</sup> ABA Model Rule of Professional Conduct 1.0(c) and Comments 2-4 (2002).

<sup>71</sup> Va. Legal Ethics Opinion 1633 (1995).

order to determine any conflicts of interest or make referrals.<sup>72</sup> Once a client is referred outside an organization to a network attorney, the worker and organization still owe a duty of confidentiality to the client and must not reveal that information to anyone. So long as the client has consented to the disclosure and no duty of confidentiality has developed, then it is much clearer that the organization is free to represent a future client whose interests are directly adverse to the potential client it referred.

In order to determine whether a referral is needed because of a conflict with a staff attorney, there should be a process ensuring some sort of invisible wall between the staff attorneys and potential client until a determination is made. An organization should have a non-attorney intake officer gather information from the potential client; assess the situation for conflicts; and reveal only vague, unidentifiable information to the staff attorneys where there is a question as to whether a conflict exists. If the intake officer decides either on his own or with the indirect assistance of a staff attorney that a conflict of interest does exist, he should refer the potential client to a network attorney if available.

If network attorneys are not available, staff attorneys will have to comply with the following guidelines. Network attorneys, too, will have to follow the same if they receive referrals that conflict with other clients. All attorneys, both staff and network who decide a conflict exists, must decide whether informed, written consent will cure the conflict. Informed, written consent will not be sufficient, and the attorney must turn the client away in the following two circumstances: (1) the client's interests are directly adverse to a present client of the attorney; or (2) there is a significant risk that representation of one client will be materially limited by the attorney's own interests or by the attorney's responsibilities to another client, former client, or third person.<sup>73</sup> If neither of these two circumstances are present and the attorney reasonably believes that he can represent both clients who caused the conflict, the informed written consent must be obtained from both affected clients in order for the attorney to continue representing both.<sup>74</sup> For a sample consent form, see Appendix, Chapter 5 consenttoconflicts

## **ii. Referrals and Legal Fees**

Like the previous section on conflicts of interest, there are special considerations for both staff and network attorneys regarding referrals and legal fees. The first two following paragraphs are relevant to network attorneys while the remainder of the section is pertinent to both staff and network attorneys.

An attorney must not give anything of value to a person for recommending the attorney's services.<sup>75</sup> "Anything of value" ranges from money for the referral to gossip in exchange for favorable publicity. However, this rule does not prevent an attorney from paying the usual charge to a nonprofit organization that advertises its legal services and refers clients to the network attorneys. For example, a nonprofit organization could charge attorneys a set fee in exchange for referrals or being included on a referral list. In effect the attorney is paying for the referral, but

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<sup>72</sup> Va. Legal Ethics Opinion 1633 (1995).

<sup>73</sup> ABA Model Rule of Professional Conduct 1.7(b) (2002).

<sup>74</sup> Comments 14-15, 18, 20 to ABA Model Rule of Professional Conduct 1.7(b) (2002).

<sup>75</sup> ABA Model Rule of Professional Conduct 7.2(b) (2002).



this is an exception to the rule.

As for network attorneys who accept a referral from a nonprofit organization, it is unethical for the attorney to charge or collect a contingent fee for the representation.<sup>76</sup> If the nonprofit organization itself is going to pay the attorney's fees, the client must give informed, written consent. Additionally, the organization must not interfere with the attorney's professional judgment; and the arrangement cannot compromise the client's confidential information.<sup>77</sup>

If a network attorney is working collectively with one of the staff attorneys, then there can be no fee splitting, unless four conditions are met: (1) the attorneys work together, (2) the client has given informed, written consent to the fee agreement; (3) each attorney is paid proportionally to the work done; and (4) the total fee is reasonable. Therefore, if an organization uses a network attorney on the case, the client must sign a written fee agreement outlining all the details of the arrangement.

In addition, an attorney cannot ordinarily share legal fees with non-attorneys. Some ethics opinions, including some in Virginia, have allowed attorneys to share or turnover court-awarded fees to nonprofit organizations which sponsored the litigation.<sup>78</sup> In addition, the organization is allowed to collect more than the amount necessary to reimburse its costs so long as all fees are put into a fund used exclusively for litigation.<sup>79</sup> Note that these exceptions only apply in the litigation context. An attorney cannot charge for transactional work, such as preparing a will or filing tax returns, and then turn those fees over to a nonprofit organization.

It may be tempting for an attorney to attempt to get paid for his services through gifts from his clients, but attorneys should heed the next rule. It is unethical for an attorney to solicit a substantial gift from a client.<sup>80</sup> An attorney may accept a "simple gift" if it is comparable to the occasion and may even accept an unsolicited substantial gift with the understanding that the client may come back one day and claim undue influence, thus rendering the gift void.<sup>81</sup> Therefore, an attorney must neither solicit a gift nor prepare a legal instrument that creates a substantial gift to the attorney or the organization for which he works. If a client wishes to leave a testamentary gift to his attorney or the organization that referred the client, that client should have an outside, independent attorney assist him with his last will and testament.

Lastly, it is important for organizations to know that attorneys cannot assist clients financially in connection with pending or contemplated litigation.<sup>82</sup> The only exception is that an attorney may advance court costs or other litigation expenses. For example, an attorney may pay the filing fees, expert witness fees, court reporter fees, etc., but an attorney cannot under any circumstances give a client money for groceries, rent, or any other personal need while litigation is pending. For sample fee agreements, see Appendix, Chapter 5, [retainersample](#)

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<sup>76</sup> Va. Legal Ethics Opinion 1691 (1996).

<sup>77</sup> ABA Model Rule of Professional Conducts 1.8(f), 1.7(b), and 5.4(c) (2002).

<sup>78</sup> Va. Legal Ethics Opinion 1744 (2000).

<sup>79</sup> *American Federation of Government Employees v. U.S. Dept. of Justice, et al.*, 944 F.2d 922, 934, (1991).

<sup>80</sup> ABA Model Rule of Professional Conduct 1.8(c) (2002).

<sup>81</sup> Comments 6-8 to ABA Model Rule of Professional Conduct 1.8 (2002).

<sup>82</sup> ABA Model Rule of Professional Conduct 1.8(e) (2002).

## B. Unauthorized Practice of Law

Depending on the state in which one is incorporated and has its principal place of business, a nonprofit organization with staff attorneys may have to register with the state bar. Most states require organizations that employ attorneys engaged in the practice of law to register with the state bar. If those organizations do not register, then they are guilty of unauthorized practice of law. The question arises whether a nonprofit organization is exempt from this requirement.

Some states hold that nonprofit organizations who do not register with the state bar are in fact engaged in the unauthorized practice of law.<sup>83</sup> If the nonprofit organization does not register with the state bar, then it will have to forfeit any right to attorney's fees.

Other states allow an exception for organizations organized for charitable and benevolent purposes.<sup>84</sup> When nonprofit organizations are exempted from registering with the state bar, they should probably still be careful to meet the following four factors as outlined by a New Jersey court: (1) the role of the organization should be that of an intermediary between the attorney and client; (2) there can be no interference by the organization once an attorney has been assigned to the client; (3) the organization must be liable for any damages arising from its own attorneys' malpractice (this does not apply to attorneys outside the organization who should have their own malpractice insurance); and (4) an attorney, either individually or with a board of attorneys, must determine which cases to accept and how to handle those accepted.

In regards to the last factor, nonprofit organizations must permit only attorneys to make decisions regarding individual cases. Although a non-attorney board may still set overall program priorities, it must not make decisions about individual cases. These overall priorities include setting financial and similar eligibility criteria, allocating available resources and manpower, and determining what types of cases that will be handled.<sup>85</sup> Furthermore, if an attorney wants to provide further protection for herself against any future disciplinary actions, she may insist that the organization's charter provide that the organization will not attempt to interfere with or influence the attorney's independent professional judgment regarding selection and management of a case.<sup>86</sup>

## IV. Confidentiality

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Confidentiality is the discretion to keep secret information private. Confidentiality is the cornerstone of trust upon which the NPO client relationship is built. Every NPO will acquire information of a confidential nature. This could be as simple as the names, addresses, social

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<sup>83</sup> See District of Columbia Court of Appeals Rule 49 (2004); *In re Co-Operative Law Co.* (N.Y.); and *Frye v. Tenderloin Housing Clinic, Inc.*, S127641 (Ca. App. 2004) (California Supreme Court has granted review, and the case has been placed on the docket).

<sup>84</sup> See *In the Matter of Education Law Center, Inc.*, 429 A.2d 1051, 1058-1059 (N.J. 1981); and *Dixon v. Georgia Indigent Legal Services, Inc.*, 388 F. Supp. 1156, 1165 (S.D. Ga. 1975).

<sup>85</sup> See generally *South Carolina Bar Ethics Advisory Committee*, Ethics Advisory Op. 02-04 (2002); and ABA Comm. on Ethics and Professional Responsibility, Formal Op. 324 (1970).

<sup>86</sup> Wayne Moore, *Are Organizations that Provide Free Legal Services Engaged in the Unauthorized Practice of Law?*, 67 FORDHAM L. REV. 2397, 2406-2407 (1999).

security numbers, and other personal information of clients and as complex as legally protected information (i.e. verbal communications between clients and the NPO, medical records, tax records, etc.). This type of information given to any NPO by a client must be guarded and held in the highest trust by all. There are no federal or state laws that tell NPO Board members how they are to maintain confidentiality information as a whole. This lack of clarity can be somewhat dangerous for new NPOs. In order to fulfill this duty and avoid abusing the rights of their clients there are three areas Board members need to look to: industry specific laws, sector regulation, and NPO specific policy. Nonprofits would be well served to seek legal counsel to assure adherence to and interpretation of the legal, industry, and NPO specific requirements.

### **A. Industry Specific Laws**

The United States does not have an overall consumer protection law but instead a network of laws each applying to a particular sector or type of information. An industry wide law comes as result of continued public outcry that information considered highly sensitive is deserving of the protection under the law. This was the situation concerning medical records. With the technological advance of computers, the vulnerability of medical records to outside access increased. The government responded by passing a federal law entitled the Health Insurance Portability and Accountability Act (HIPAA). Now HIPAA sets a national standard for privacy of health information. For a NPO that deals with medical information, this legislation is important for Board members to know. Although every federal law in your sector will not necessarily apply to your NPO, Board members must be aware of which laws do apply. Once you have determined which laws concern your NPO you must then ascertain which portions of that law apply to you. In cases, such as HIPAA where some actions are beyond the reach of the law, only certain aspects of the law are applicable to NPOs.

Additionally, Board members need to be aware of state laws that might affect them. Many states adopt laws that are applicable only to individuals in that state. This is a concern for NPOs that want to serve multi-state clientele.

### **B. Individual Sector Regulation**

The U.S. has generally chosen to allow industries to "self regulate." Unfortunately, this makes it hard for Board members to know what their clientele's privacy rights are if they don't particularly fit into in one sector. There are many instances where confidential information is being gathered by NPOs and there is no specific set of laws to cover the handling of that information. Most of the "self regulation" offered by industries has been to request that companies state their current policies with regard to the handling of confidential information, rather than to require conformity to specific practices.

Occasionally, sectors find themselves regulated by law, but most frequently the leaders of the sector establish a set of rules for the industry to abide by. When your NPO services a sector that has created a specific set of rules that apply to your NPO, you must adhere to those rules. This applies even if the rules were created for a body of professionals unrelated to your board. One group sure to have a general set of rules for handling confidential information that can serve as a guide for Board Members are the lawyers in the state. Each state has a specific set of rules

outlined in the Code of Professional Responsibility<sup>87</sup> for the lawyers of your specific state. Virginia Lawyers can go to <http://www.vsb.org/profguides/index.html> for the rules. This industry considers information confidential if it is (a) communicated during executive session; or (b) otherwise communicated with a mutual understanding of confidentiality. These are two general classifications that can be applied to most industries.

### **C. NPO Specific Policy**

One of the major duties of the entire board, during the formation period of your organization, is a NPO specific policy on how you plan to handle confidential information. The Board should develop a set of organization specific rules regarding confidentiality, and ensure that all employees and volunteers are made aware of and adhere to such rules. A nonprofit should have policies in place, and should routinely and systematically implement those policies, to prevent actual, potential, or perceived breaches of confidentiality.

When drafting the documents that will convey the nonprofits' confidentiality agreement there are four things that should be included: (a) notice of privacy/confidentiality policy, (b) types of confidential information organization collects, (c) parties to whom the organization can lawfully disclose information, and the organization's stance on (d) confidentiality and security of nonpublic personal information.

What should be included in this policy?

1. The policy should be written;
2. The policy should be applicable to board members and staff, and volunteers of the organization;
3. The policy should identify the types of conduct or transactions that raise confidentiality concerns;
4. The policy should set forth procedures for legal disclosure of confidential information; and
5. The policy should provide for review and repercussions for breaches of the policy.

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<sup>87</sup> Although the rules differ from state to state they generally look like the provisions created for Virginia Lawyers. See Appendix [VAattyconfidentialityrules](#)

Once the policy is in place remember to:

1. Provide board members, staff and volunteers with the organizations' confidentiality policy.<sup>88</sup>
2. Translate the policy into a written agreement entered into with all clients that disclose confidential information. [consenttodisclosure](#)
3. Provide and collect copies of the policy signed by board members, staff, and volunteers, both at the time of the individual's initial affiliation with the organization and at least annually thereafter.
4. Review the policy annually for needed upgrades as the NPO grows and/or ventures into new industry avenues.<sup>89</sup>

Examples of all these types of policies and agreements can be found in the Appendix. [confidentialitypolicy](#)

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## **V. Board Duties**

Governance has been defined as “the overall processes and structures used to direct and manage an organization’s operations and activities.”<sup>90</sup> On a more basic level, governance deals with the ways in which rights and responsibilities are shared between the various corporate participants, especially the management and the shareholders. Protecting the public interest is the overall goal of governance. In the nonprofit sector, the board of directors is comprised solely of volunteers and governance is their domain. According to the Alliance for Nonprofit Management, the board of directors must “stand outside the organization and hold it accountable to the public interest.”

“The distinction between management and governance is not absolute.”<sup>91</sup> However, many individuals believe that the governance role is the exclusive jurisdiction of the board of directors whereas the management role belongs solely to the executive director and senior staff members. Board Duties listed here are generic and not all encompassing. Additional duties may be developed and assigned as deemed necessary.

### **A. General**

In its governance role, the board develops policies and procedures in order to provide guidance to the agency. In its management capacity, the board ensures the agency has the necessary financial and human resources in order for the agency to function. Some boards choose to actively participate in the operations of the agency. For example, the board and senior staff can agree to share management responsibilities in areas of public policy development and education, while at the same time designating as an exclusive staff function the management of finances, human resources, and administration. In the early stages of an organization’s development, the Board will likely participate in management by necessity.

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<sup>88</sup> This should be done during the orientation period for these individuals and a copy should be included in their orientation packet for their records.

<sup>89</sup> This could easily be addressed during the board training that should be happening at least once a year.

<sup>90</sup> Panel on Accountability and Governance in the Voluntary Sector, <http://www.vsr-trsb.net/pagvs/>.

<sup>91</sup> The Internet Non-profit Center, <http://www.nonprofits.org/>.

## **B. Governance**

Board responsibilities can be divided into minimum requirements for the board as a whole, and individual requirements for each member. At a minimum the board is responsible for:

- Development of mission statement
- Adopting policies and procedures for the organization
- Financial success of the organization including approval of an annual budget
- Adopting bylaws
- Ensuring legal requirements are met
- Ensuring effectiveness of the board
- Administration
- Appointment of committees for financial and planning functions
- Effective public relations and communications
- Hiring an executive director
- Monitoring and evaluating performance of the chief executive
- Working conditions

In addition to the minimum requirements listed above, the Board members are also individually responsible for knowing and understanding the organization's mission, vision, and mandate and legal obligations, ensuring legal obligations are strictly followed, understanding their fiduciary responsibility that is imposed by law, understanding financial and budget matters, and understanding tax law and employment legislation that is specific to the nonprofit organization.

In order to meet both general and individual requirements, a board member training program should be offered to all board member candidates. For start up nonprofit organizations, the training program should include at a minimum:

- An orientation packet with information on the nonprofit's goal and proposed mission statement, the Articles of Incorporation and the filing for tax-exempt status
- Expectations of nonprofit organizations, including time commitment expectations, attendance policy and an overview of general and individual requirements
- Literature on the board member's fiduciary responsibility imposed by law, and the requirements to ensure the organization's best interests come first and that conduct not be based on personal gain or for the benefit of family or friends
- Attestation process (See Attachment #1)

For established nonprofit organizations, it is good policy that the training program should include an orientation packet with the nonprofit's mission and vision statement, the Articles of Incorporation and the filing for tax-exempt status as well as an outline of expectations from the organization.

### **C. Legal Responsibility**

“The courts have said that it is no longer possible to be a passive director. Lack of knowledge or passive participation will not absolve the director of legal responsibility.”<sup>92</sup> It is imperative that board members not only understand their legal responsibility, but also take it very seriously. Board members must also understand the consequences of an organizational collapse. In such an instance, the board members may be personally liable for workers’ unpaid wages, and vacation, severance and overtime compensation if they act in bad faith fail to apply the appropriate duty of care.

### **D. Duty of Loyalty and Care**

Members of the board of directors assume legal responsibility for the actions of the nonprofit. There are three fundamental legal duties that all board members must follow. These three duties are commonly referred to as fiduciary duties and are applicable to everything that the board of directors does. If board members fail to keep in mind their fiduciary duties when taking action for the nonprofit, they can be held liable for any negative consequences of their actions.

The first fundamental duty is duty of care, which deals with the competence level expected of a board member and is commonly expressed as the duty of "care that an ordinarily prudent person would exercise in a like position and under similar circumstances." The board member owes the duty to exercise reasonable care when making any decision as a steward of the organization. It is important to note that the interpretation of the standard may vary by state. In order to meet the reasonable care standard, a board member is required to:

- Take an active and informed role in decision-making
- Attend board meetings regularly.
- Ask clarifying questions and make independent decisions based on information from committees, outside professionals, and staff members.

The second fundamental duty is the duty of loyalty is associated with the level of faithfulness expected of a board member. When making decisions as a steward of the organization, board members must give their undivided allegiance. It is unacceptable to use information they are privy to for personal gain. In order to meet the loyalty standard board members must:

- Disclose interest to board of directors (See Attachment #2)
- Receive transaction approval by majority of non-interested members of the board
- Adhere to the conflict of interest policy

A subset of duty of loyalty is the duty of obedience. This duty is specifically related to the level of faithfulness to the organization’s mission. It is unacceptable for a board member to act in a manner that is inconsistent with the goals of the organization (mission statement, Articles of Incorporation, bylaws, tax-exemption documentation). The basis for the Duty of Obedience rule

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<sup>92</sup> United Way of America, <http://national.unitedway.org/>.

is the public's trust given to the organization that donated funds will be properly managed in order to fulfill the organization's mission.

## **E. Policies and Procedure**

The purpose of policies and procedures is to have a document in place to facilitate smooth transitions of individuals especially in organizations with high employee turnover. A well-written policies and procedures manual also serves as a useful training tool for new employees and those transitioning to new job responsibilities. This section addresses what to include in a policies and procedures manual, the steps in preparing a nonprofit policies and procedures manual, and common mistakes to avoid.

Simply defined, a policy is a statement of operating intent that explains the necessity for a particular action or function. It is important to write policies that allow some flexibility in interpretation. In order for policies to be effective, it is essential that employees have a clear understanding of the organization's overall objectives and goals. A procedure is a statement describing the method for implementing a policy. Statements should be extensively detailed and specifically limit the actions of those involved. One way to differentiate a policy versus a procedure, is to think of policy as "the why" and procedure as "the how."

In order to allow management the opportunity to prioritize the project and allocate the proper amount of resources to complete it, development/revision of policies and procedures should be listed as an item on the board meeting agenda. When preparing the Policies and Procedures Manual, it is important to explain the manual's purpose and goals by defining policy and procedure to all individuals at the nonprofit organization. For organizational purposes, the nonprofit should create a master file where all documents used in developing/revising policies and procedures can be kept.

The development of a well thought out manual can be an overwhelming task for anyone. For simplicity, the organization may wish to divide the manual into sections for each area including, but not limited to, Mission statement, Finance and accounting, Investment policy, Operations, Personnel, Budgeting, and other sections vital to the success of the nonprofit organization. After the draft of the policies and procedures for each section is complete, management and board members should review, comment and revise as necessary. Nonprofits should also include a section on process for updating manual on a quarterly/semiannual basis and an attestation form for sign off by every employee indicating they have read and understand the manual.

Common mistakes to avoid when developing a policies and procedures manual include:

- Get it done early. Be proactive not reactive. Decide on policies and procedures comprehensively in advance and write them down. Don't wait until a problem has arisen.
- Don't discount the value of policies and procedures. Written policies and procedures have no value by themselves. It is important to have employees sign off on the policies on an attestation form and to clearly document problems when employees violate policies or fail to perform their jobs' essential functions. Documentation can help protect the nonprofit



organization's rights and control possible litigation costs. If employee misconduct leads to dismissal, employees will generally seek unemployment compensation. The nonprofit organization may not be liable for the claim if they can show discharge was for a valid, business-related cause.

- Have a process in place to review the manual periodically. Accounting and computer policies particularly require updates to reflect changes and allow for more efficient training of new employees.
- Do not copy another nonprofit's manual. In the short run, this may be quicker and cheaper but in the long run, could cost more money due to implementation of policies and procedures that employees do not understand or that do not apply to the nonprofit organization.
- Language in the manual should not communicate distrust of employees. Manuals that read as though there is the expectation of trouble may create resentment and resistance. Employees may perceive the manual as something negative that is being imposed on them.

## **F. Record Keeping Requirements**

Generally speaking, a nonprofit organization must keep books and records to show that it complies with tax rules. If a nonprofit organization fails to maintain required records, it may be unable to demonstrate that it qualifies for exemption and risks losing its tax-exempt status. An efficient recordkeeping system also allows the nonprofit agency to monitor the progress of programs and assist in the preparation of required financial statements and returns.

Efficient records management may directly contribute to the success of a nonprofit agency's program. Conversely, it may also directly contribute to the ability to identify quickly the potential failure of a program. Detailed records can show whether a particular program is successful, needs improvement or is destined for failure. In addition, records management can provide supporting evidence on recommended changes that should be implemented. One key document that is included in this category is minutes from board meetings. Some key items that should be included in the meeting minutes include attendance, takeaway assignments with assigned owners, voting results and notations if a board member leaves the room because of a conflict of interest.

In order to prepare accurate financial statements, it is imperative that revenue and expense statements and balance sheets are maintained. Since the sources of contributions to the organization are unlimited, it is important to have a records management system that identifies program vs. non-program receipts. This separation will assist the nonprofit organization with listing taxable vs. non-taxable income and completing Schedule A of Form 990. When working with banks, creditors and contributors, nonprofits should make sure they are clear and consistent with the information they provide. By referring to the financial statement in all cases, the nonprofit can limit their reputational risk by providing consistent, accurate information.

Income, expenses and credits included on Form 990 series and other tax returns must be supported by the nonprofit organization's records. Typically, these supporting records are the

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same records used to monitor progress of programs and to prepare financial statements. In addition, a tax-exempt organization must provide its records to the IRS for inspection upon request. During the IRS's inspection, they may have questions regarding items reported. By having an efficient records management system, an organization will be able to quickly and efficiently address any of the IRS's concerns or questions.

The law does not mandate a certain kind of record, so organizations can develop a recordkeeping system that is customized to their activities as long as it clearly shows their income and expenses. The type of records an organization should maintain for federal tax purposes is contingent upon the type of activities an organization conducts. If an organization has more than one program, separate records must be maintained for each program. An efficient recordkeeping system should include a summary of transactions and kept in the organization's books. For example, the organization may have a binder for all meeting minutes, a binder for all accounting journals and ledgers. In smaller organizations, the checkbook may serve as the main record.

Supporting documentation that should be maintained including grant applications and awards, sales slips, paid bills, invoices, receipts, deposit slips and canceled checks. All of these documents support entries made in the books and on tax returns. These documents should be organized and kept in a safe place. For clarification purposes, the table below lists categories of supporting documentation and the documents associated with each category:

| <b>Category</b>  | <b>Description</b>   | <b>Applicable Documents</b>   |
|------------------|--|---|
| Gross Receipts   | Amounts received from any and all sources.   | Cash register tapes, bank deposit slips, receipt books, invoices, credit card charge slips and Form 1099-MISC, Miscellaneous Income |
| Purchases        | Items bought including resold items. Documents also used to value inventory at year end.   | Canceled checks, cash register tape receipts, credit card sales slips and invoices.   |
| Expenses         | Costs incurred by the organization to carry on its program, excluding purchases.   | Canceled checks, cash register tapes, account statements, credit card sales slips, invoices and petty cash slips.                   |
| Employment Taxes | Only applicable if organization has employees.   | Reference Publication 15, Circular E, Employer's Tax Guide  |
| Assets           | Property owned by the organization and used in its activities. Records must be kept on when and how the asset was acquired (including any debt financing), purchase price, depreciation and/or casualty deductions, how the asset was used, disposal method, selling price and expenses associated with the sale | Purchase and sales invoices, real estate closing statements, canceled checks and financing documents.                               |

Generally speaking, an exempt organization must keep a record as long as it may be required to administer provisions of the Internal Revenue Code. Therefore, an organization must keep supporting documentation for an item of income or deduction on a return until the retention requirement for the return expires. Usually the retention requirement for returns is three years after the date the return is due or filed, whichever is later.

1. **Permanent Records.** Records include application for recognition of exempt status, the letter granting or denying exempt status and the organizing documents including articles of incorporation and by-laws with any amendments.
2. **Records Retained for Non-Tax Purposes.** In some cases, entities may mandate an organization retain records longer than what is required by the IRS. Entities include a grantor, an insurance organization, a creditor or a state agency.
3. **Employment Tax Records.** An organization with employees must keep employment tax records for a minimum of four years after the date the tax becomes due or is paid, whichever is later.

In order to comply with all applicable rules and regulations, including Sarbanes Oxley, it is important that the nonprofit have an established process for collection, and retention and destruction of documents and materials. This process protects the nonprofit from identity theft, reduces potential exposure to litigation, and protects the nonprofit's brand and reputation.

## **G. Reporting Requirements**

501(c)(3) organizations must disclose certain documents to the public for inspection and provide copies for a reasonable charge. Organizations must disclose Form 1023, its exemption application along with all supporting documents. In addition, an organization must also disclose its exemption ruling letter from the IRS. Form 990 series including schedules, attachments and supporting documentation filed with the IRS must be made available for disclosure for three years after the due date or filing date of the return, whichever is later. The organization does not, however, have to disclose Schedule B of Form 990 or Form 990-T and does not need to identify its contributors. Penalties are assessed to organizations and to persons responsible for the failure to comply with disclosure requirements. A reasonable charge for copying, as defined by the state of Virginia, is the amount charged by the IRS. Currently, the IRS charges \$1.00 for the first page and \$0.15 for each subsequent page.

There are two general guidelines that organizations must follow in order to meet substantiation and disclosure requirements for federal income tax return reporting purposes:

1. A written acknowledgement must be provided to the donor for any single contribution greater than \$250 before the donor may claim a charitable contribution on their federal income tax return.
2. A written disclosure must be provided to the donor from the charity for a payment greater than \$75 that is partly for goods or services provided by the organization and partly for a contribution to the organization.

## CHAPTER 1 APPENDIX

### *NEEDS ASSESSMENT and MARKET ANALYSIS APPLIED*

For our purposes, we have decided that we want to set up a nonprofit which will service the legal needs of cancer patients in Southwest Virginia, tentatively in Roanoke and the surrounding area.

## I. Who, What and Where: An Overview of the Roanoke Population

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### A. Demographics<sup>93</sup>

To determine the general make-up of the Roanoke population, we first looked at basic demographic data compiled from various web sites. We wanted to determine the basic population size, income level, and racial make-up of the area, as well as languages spoken. These figures help us to better understand the constituency we will be serving. In order to put this information in perspective as far as determining the relative needs of this population, we compared the Roanoke area to the state overall.

As of the census of 2000, there are 94,911 people, 42,003 households, and 24,235 families residing in Roanoke city. The racial makeup of the city is 69.38% White, 26.74% African American, 0.20% Native American, 1.15% Asian, 0.02% Pacific Islander, 0.72% from other races, and 1.78% from two or more races. 1.48% of the population are Hispanic or Latino of any race.

Of 42,003 households, 25.5% have children under the age of 18 living with them, 16.5% have a female householder with no husband present, and 12.8% have someone living alone who is 65 years of age or older.

Roanoke's population has 22.6% under the age of 18, 8.2% from 18 to 24, 30.5% from 25 to 44, 22.3% from 45 to 64, and 16.4% who are 65 years of age or older. The median age is 38 years.

The **per capita income for the city is \$18,468. 15.9% of the population and 12.9% of families are below the poverty line.** Out of the total people living in poverty, 24.4% are under the age of 18 and 11.3% are 65 or older.

The United States Census Bureau includes in Roanoke's metropolitan area the **counties of Botetourt and Roanoke, and the cities of Salem and Roanoke.** The metropolitan area's population in the past census was 235, 932.

Roanoke has a very small percentage of non-English speaking residents. While 4.6% speak a language other than English at home, only 1.7% speak English "less than very well." Those that

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<sup>93</sup> See <http://www.nationmaster.com/encyclopedia/Roanoke,-Virginia>;  
<http://roanokeva.usl.myareaguide.com/census.html>; <http://www.poecronk.com/market/swva/3806800.pdf>.

cannot speak English well are split almost evenly between Spanish, Asian-Pacific, and Indo-European. This indicates a low need for translators as we begin to provide services here.

Due to low income levels, many Roanoke residents likely lack health insurance. The Free Clinic of the New River Valley, accessible to residents of Roanoke, serves uninsured residents who meet their income guidelines. Residents are eligible for care if their income falls below \$10, 855 for a single person household.<sup>94</sup> According to the Clinic’s newsletter for Spring 2003, “During the fiscal year 2002, the Clinic set two all-time records by serving 2,993 New River Valley patients.”<sup>95</sup> As noted below, this could account for a lack of preventative care, which leads to the high incidence of cancer in the area.

### **POPULATION AND INCOME<sup>96</sup>**

| <b>Area</b>               | <b>Per Capita Income</b> |
|---------------------------|--------------------------|
| Allegheny County          | 19,635                   |
| Botetourt County, VA      | 13,810                   |
| Bedford County, VA        | 14,305                   |
| Craig County, VA          | 11,186                   |
| Franklin County, VA       | 11,936                   |
| Montgomery County, VA     | 17,077                   |
| Roanoke County, VA        | 24,637                   |
| Bedford, VA               | 15,423                   |
| Clifton Forge, VA         | 15,182                   |
| Covington, VA             | 16,758                   |
| Roanoke, VA               | 18,468                   |
| Salem, VA                 | 20,091                   |
| Average Per Capita Income | 16,542                   |

Total Population for Roanoke and Surrounding Area: 462,126

### **PER CAPITA INCOME AS COMPARED TO STATE OVERALL**

|                              |          |
|------------------------------|----------|
| Roanoke and Surrounding Area | Virginia |
| \$16,542                     | \$32,459 |

<sup>94</sup> See <http://www.nrvfreeclinic.org/eligibility/index.html>

<sup>95</sup> See [http://www.nrvfreeclinic.org/pdfs/spring\\_newsletter2003.pdf](http://www.nrvfreeclinic.org/pdfs/spring_newsletter2003.pdf)

<sup>96</sup> See at <http://www.pocronk.com/market/swva/3806800.pdf>; <http://quickfacts.census.gov/qfd/states/51000.html>; <http://www.roanokeva.gov/WebMgmt/ywbase61b.nsf/CurrentBaseLink/N25ZEHYC976LBASEN>.

*Average per capita income is significantly below the state per capita income. While the cost of living is slightly lower, the cost of living difference only slightly corrects for this difference in income.*<sup>97</sup>

### THE SPECIFICS

Along with basic socio-economic data and indicators, we needed to determine the incidence of cancer in the Roanoke area to make sure that a sufficient constituency base exists to support a legal services organization set up specifically to address to needs of those suffering from the ramifications of cancer. We located statistical data concerning cancer incidence in Roanoke on-line at the Virginia Health Department web site,

<http://www.vahealth.org/cancerprevention/analysis.pdf>. We found the following:

#### CANCER SPECIFIC RISKS<sup>98</sup>

| Cancer Site |          | Incidence/<br>100,000<br>(Rank) | Percent<br>Local Stage<br>Disease<br>(Rank) | Mortality<br>Per<br>100,000 | Risk Factor<br>Prevalence<br>(Rank) | Overall<br>Quartile |
|-------------|----------|---------------------------------|---|-----------------------------|-------------------------------------|---------------------|
| Breast      | Roanoke  | 230.6 (35)                      | 69.2 (12)                                   | 43.4 (27)                   | 57% (15)                            | 4                   |
|             | Virginia | 127.1                           | 66.8  | 30.8                        | 55%                                 |                     |
| Cervical    | Roanoke  | 51.3 (30)                       | 88.5 (16)                                   | 7.9 (35)                    | 55% (33)                            | 4                   |
|             | Virginia | 36.6                            | 88.1  | 3.3                         | 70%                                 |                     |
| Colorectal  | Roanoke  | 102.2 (35)                      | 33.0 (13)                                   | 31.6 (31)                   | 37% (9)                             | 4                   |
|             | Virginia | 43.1                            | 31.7  | 19.4                        | 30%                                 |                     |
| Lung        | Roanoke  | 120.2 (35)                      | N/A   | 88.5 (31)                   | 37% (2)                             | 3                   |
|             | Virginia | 56.4                            | N/A   | 56.0                        | 49%                                 |                     |
| Prostate    | Roanoke  | 169.9 (30)                      | 66.7 (28)                                   | 38.5 (28)                   | N/A                                 | 4                   |
|             | Virginia | 99.9                            | 76.8  | 25.3                        | N/A                                 |                     |

*Incidence of cancer in the Roanoke area is high, likely due to a lack of preventative care which stems from the low income and lack of health insurance.*

*Rank* -Compared to overall health districts in Virginia. Range: 1 (low)- 35 (high)

*Risk Factors*<sup>99</sup> - Breast Cancer: Mammogram in past year

Cervical: Pap smear in prior year

Colorectal: Endoscopies

Lung: Smoking prevalence

*Overall Quartile*- Composite risk based on incidence, present local disease, mortality, and risk factor prevalence. Quartile 1= lowest risk and quartile, 4= highest risk.

<sup>97</sup> See <http://www.roanokeva.gov/WebMgmt/ywbase61b.nsf/CurrentBaseLink/N25ZEJ2M944LBASEN>.

<sup>98</sup> See <http://www.vahealth.org/cancerprevention/analysis.pdf>.

<sup>99</sup> i.e. Lack of preventative screening increases the incidence and severity of cancer in the Roanoke area.

## **SUMMARY OF CANCER INCIDENCE IN ROANOKE**

Demographic Characteristics of Roanoke Health District are fairly similar to that for Virginia overall, with slightly higher elderly and non-white proportions of the population. The overall risk factor for the area is very high, with four of five preventable cancers ranked in the highest risk ranking, quartile 4. Only lung cancer is ranked in the second highest risk ranking, quartiles 3.

Breast cancer in this health district has a 200% higher incidence than for the state overall. The mortality rate is higher than in Virginia overall, but has remained static over time. The early detection rate is still less than 70% and is not improved over time, perhaps due to the lower per capita income than in the state overall translating into less access to health care and preventative measures and less medical resources. The mammography screening rate is low, but is improving.

Cervical cancer is also high risk preventable cancer in the Roanoke Health District and the incidence is high as well as the mortality. Pap screening is low at 15% below the state average. Early detections rates are comparable to the state, but the screening for cervical cancer has gone down.

Colorectal cancer is also high risk. The incidence is more than 200% of that in the state overall, and mortality is significantly higher. Early detection rates are similar to that in the state overall, which is low to begin with, but there has been no improvement in early detection over time.

Lung cancer, with quartile rating 3, has an incidence more than 200% of the state incidence as well. Mortality is also higher and has continued to increase.

Prostate cancer has a higher incidence and mortality rate in the Roanoke Health District than in Virginia overall, the early detection rate is lower, and has decreased over time. Mortality rates are down slightly despite the decrease in early detection.

The high incidence of cancer and low incomes of many Roanoke residents indicates a potential need for a legal services organization for those suffering from cancer. While the population is conducive to such services, the next step is to determine whether such services are already available.

## **WHAT THE DEMOGRAPHICS MEAN**

The Roanoke Health District has a significantly lower per capita income than does Virginia overall, which could account for lack of preventative health care and therefore the much higher incidence, lower rate of early detection, and higher mortality for cancer. Although demographics in Roanoke as far as age and race are similar to the state overall, the difference in income and the perhaps related much higher incidence of cancer and resultant mortality, indicates that the population of Roanoke and surrounding area likely has a great need for low-cost legal assistance for those legal complications arising out of and heightened by cancer.

Given the presence of the Cancer Center of Western Virginia, the need for legal assistance for those complications arising out of this illness will be even greater, and may include a

constituency base that stretches beyond Roanoke into Tennessee and West Virginia. This analysis may depend on whether such services are already available to persons in these locations that suffer from cancer. Conducting a search of the services available in the relevant areas may be necessary if the organization wishes to broaden its constituency to include these persons. In addition, this may broaden fund-raising efforts and influence the geographic area and the make-up of the Board of Directors.

## **B. Potential Competitors or Organizations for Collaboration in Roanoke**

Using the sources mentioned above, we identified several resources that might be potential competitors or organizations for collaboration. We were looking for legal and medical organizations that might partner with our organization, and to make sure that the services that we want to offer are not already being provided in the Roanoke area.

We found that there are not any groups in the Roanoke area currently focused on providing legal services to cancer patients. The legal aid offices will give assistance but they have income requirements that not all cancer patients will meet.

## **AVAILABILITY OF LEGAL SERVICES IN ROANOKE AND SURROUNDING AREA**

The Virginia State Bar offers a lawyer referral line for the general public.<sup>100</sup> The Virginia Lawyer Referral Service can be contacted at 804-775-0808 or at the toll free number of 800-552-7977.<sup>101</sup> The service will take basic information regarding the legal matter and will provide the number of an attorney to the caller who then must contact the attorney for appointment.<sup>102</sup> The charge at the time of the appointment is only \$35 for a half hour appointment.<sup>103</sup>

The Circuit Court Clerk's Office for Roanoke County, Virginia has a website which clearly states that they are not able to provide advice but refers inquiries to the Piedmont Legal Services, Inc./Legal Aid Society of Roanoke Valley.<sup>104</sup> These offices may be contacted at 540-34-2080 or 540-344-2088.<sup>105</sup> This court handles real estate, marriages and divorces and probate and estate matters.<sup>106</sup>

The Legal Aid Offices available to residents of the Roanoke area can be found at Blue Ridge Legal Services, Inc. which takes applications for aid for the Legal Aid Society of Roanoke Valley. These offices provide services for bankruptcy, divorces and wills for the elderly and the terminally ill but they do not specifically target or offer services for cancer patients.<sup>107</sup> The availability for services depends on the income level of the individuals which must be less than

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<sup>100</sup> See The Virginia State Bar Association, Virginia Legal Referral Services, <http://www.vsb.org/vlrs.html>

<sup>101</sup> Id.

<sup>102</sup> Id.

<sup>103</sup> Id.

<sup>104</sup> <http://www.roanokecountyva.gov/Departments/CircuitCourtClerksOffice/Default.htm>

<sup>105</sup> Id.

<sup>106</sup> Id.

<sup>107</sup> Telephone conversation with Nancy, Blue Ridge Legal Services (Spring 2005) and a Telephone conversation with Charity, Blue Ridge Legal Services (April 7, 2005).



\$15,613 for a household of two people.<sup>108</sup> If applicants for legal services do not meet this eligibility requirement, services will not be free, but they might still receive services for a reduced fee.<sup>109</sup>

## **MEDICAL ORGANIZATIONS IN THE ROANOKE AREA**

For our purposes, it will also be helpful to contact medical organizations and agencies in the Roanoke area that might provide information and referrals. Such organizations include: Roanoke City Department of Social Services, Roanoke County Department of Social Services, the Roanoke office of the American Cancer Society, Carilion Cancer Center of Western Virginia, Bedford Memorial, Gill Memorial EENT Hospital, CentraHealth LGH/VBH, Columbia Lewis-Gale Medical Center, and HCA Hospitals of Southwest Virginia.

All of the above organizations deal with cancer patients on a day-to-day basis and will be excellent sources for referrals. They will also be able to provide us with their current procedures for dealing with patients that have financial or legal needs so that we would be better able to tailor the organization to the needs of those patients. Also see Chapter 4's section "Sources for Board Members" for listings of hospices and an oncology practice.

When contacting organizations in the medical field it will be helpful if we emphasize that this organization will not be providing any medical malpractice services. This information should create a greater degree of openness and receptiveness, because it lets the medical professionals know that our organization is intended solely for the benefit of cancer patients and will not pursue endeavors that would be to the detriment of partners in the area.

### **C. Identify the Geographic Area**

The geographic area of greater Roanoke was chosen in this example because of the needs assessment which indicated that this area may benefit from this type of nonprofit organization. The greater area was chosen instead of just the city of Roanoke because we wanted to encompass more people and serve the same area as the hospitals.

Roanoke is home to the Carilion Cancer Center of Western Virginia, a facility which conducts out-patient treatments for persons all over western Virginia and the surrounding area. This facility offers both medical oncology and radiation oncology services. For the purposes of an organization that will provide legal services to cancer patients, the location of this center in Roanoke is key, increasing the potential need for the service and increasing the number of potential constituents. It may also change the geographical area which we will serve and that we will need to later research. Notably, the center also conducts clinical trials for cancer patients, conducting national clinical drug trials and offering advanced and sometimes experimental treatment options.<sup>110</sup> This means that patients often come from not only Virginia, but also from

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<sup>108</sup> Telephone conversation with Charity, Blue Ridge Legal Services (April 7, 2005).

<http://www.brls.org/RTF1.cfm?pagename=Services>.

<sup>109</sup> Id.

<sup>110</sup> <http://www.carilion.com/cancer/>

Tennessee and West Virginia, to receive treatment. Over three-hundred people have taken advantage of these clinical trials since the beginning of this program.<sup>111</sup>

#### **D. Identify Stakeholders**

When forming a legal support organization for cancer patients, stakeholders include cancer patients, lawyers, the legal community at large, hospitals, doctors, medical social workers, and potential donors. Donors can also be found by contacting local medical and legal foundations, as well as local charitable giving consortiums, including the United Way and community foundations.

In the Roanoke area, specifically, The Foundation for Roanoke Valley<sup>112</sup> helps individuals and families to establish charitable funds and awards grants to local organizations. The Foundation looks for innovative but practical approaches for solving community problems, a well planned approach to important community issues, an efficient use of community resources, the involvement of underserved constituencies and the coordination and involvement of other organizations in the area. This would be a good place for start-up funding because they do not usually give to established organizations, but rather to people with new ideas to fulfill a need in the community.

In the legal community, we should also contact the Roanoke Bar Association Foundation<sup>113</sup> for fundraising support and as a source for potential volunteers. Large local firms such as Woods Rogers<sup>114</sup> are also good contacts, as they may be able to provide pro-bono attorneys, as well as information about general practices in the area, such as who they refer clients that they do not take on as a result of income restrictions.

One thing to consider as we locate potential legal stakeholders in the community is whether there is a sufficient volunteer base, or enough attorneys to fill the needs of another nonprofit legal services organization. If there are not enough attorneys to fill volunteer needs, this may mean that our nonprofit needs more staff attorneys, a consideration which will require much different funding needs in order to provide salaries and a permanent office.

Finally, we should contact local courts to determine if there are any free clinics in the area, and if they exist, what organizations are sponsoring them. These local clinics could serve as a source for referrals or as a potential alternative for clients that the new organization is unable to help, and their sponsors may also be a source of funding for the new organization.

Major employers in the area are also stakeholders for our organization. Their employees will use our services, and they may be a source of corporate funding and donations. Examples of the major employers for Roanoke County are listed below. They may be a good resource for potential board members, fundraising or other resources.

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<sup>111</sup> Id.

<sup>112</sup> <http://www.foundationforroanokevalley.org>

<sup>113</sup> <http://www.roanokebar.com/foundation.html>

<sup>114</sup> 10 South Jefferson Street, Suite 1400, Roanoke, VA 24011; Phone: 540.983.7600

**Major Manufacturing Employers in Roanoke County<sup>115</sup>:**

1. John W. Hancock, Jr., Inc.  
300-599 employees  
Fabricated Metal Industry

2. Medeco Security Locks, Inc.  
300-599 employees  
Hardware Industry

**Major Non-Manufacturing Employers in Roanoke County<sup>116</sup>:**

1. Allstate Insurance Co., Inc.  
1000-1499 employees  
Insurance services

2. Wachovia  
1000-2499 employees  
Banking Industry

Medical organizations and agencies in the Roanoke area, useful as sources for patient referrals as well as providing information on general practices and customs in the Roanoke area, include the following:

1. Roanoke City Department of Social Services  
1510 Williamson Road NE  
Roanoke, VA 24012  
Phone: (540) 853-2591  
Fax: (540) 853-2027

Contact: Jane R. Conlin, Director

2. Roanoke County Department of Social Services  
220 East Main Street  
P. O. Box 1127  
Salem, VA 24153-1127  
Phone: (540) 387-6087  
Fax: (540) 387-6210

Contact: Betty McCrary, Director

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<sup>115</sup> This information was found under the Community Profiles section at: [www.yesvirginia.org](http://www.yesvirginia.org), the website for the Virginia Economic Development Partnership, a state authority

<sup>116</sup> Id.

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3. Roanoke office of the American Cancer Society  
9 E Church Ave  
Roanoke, VA 24011  
Phone: (540) 344-8699  
Fax: (540) 345-2361

4. Carilion Cancer Center of Western Virginia  
2013 S. Jefferson St.  
Roanoke, VA 24014  
Phone: (540) 266-6000  
Toll Free: (800) 422-8482

5. Bedford Memorial  
1613 Oakwood St.  
P.O. Box 688  
Bedford, VA 24523  
Phone: 540-586-2441

6. Gill Memorial EENT Hospital  
707 S Jefferson St  
Roanoke, VA 24016  
Phone: (540) 344-2071

7. CentraHealth LGH/VBH  
1920 Atherholt Road  
Lynchburg, VA 24501-1104  
Phone: (434) 947-3000

8. Columbia Lewis-Gale Medical Center  
1900 Electric Road  
Salem, VA 24153-7494  
Phone: (800) 543-5660  
Fax: (540) 776-4736  
Website: <http://www.lewis-gale.com/>

9. HCA Hospitals of Southwest Virginia  
1900 Electric Road  
Salem, VA 24153  
Phone: (540) 772-2890  
Website: <http://electahealth.com>

Contacts at the Carilion Cancer Center and the local hospitals can provide patient referrals from doctors and nurses that identify patients with needs. Additionally, they will be able to provide us with their current procedures for dealing with patients that have financial or legal needs so that we would be better able to tailor the organization to the needs of those patients. A close

relationship with doctors in the area will provide our organization with the information that will be necessary to assist clients that are receiving treatment locally.

Contacting the HCA Hospitals organization will provide information about the operations of all five of their hospitals in western Virginia. This data will include names and contact information for individuals that can assist our organization.

When contacting organizations in the medical field we should indicate that this organization will not provide any medical malpractice services. This information will create a greater degree of openness and receptiveness, because it lets the medical community know that our organization is intended solely for the benefit of cancer patients and will not pursue endeavors that might be detrimental to medical professionals.

The Roanoke City and County Departments of Social Services will be invaluable for client referrals as a result of their daily interactions with needy individuals suffering the financial burdens resulting from cancer treatment. The Roanoke office of the American Cancer Society is also a resource both for client referrals and for fund raising opportunities. Through the American Cancer Society, our organization might receive information about community fund raising events as well as a list of potential donors.

### **E. Sources for Board Members and Volunteers**

Here are some examples of actual business and organizations in Roanoke which may be good sources for board members and volunteers:

#### **Cancer Practice in Roanoke, VA:**

##### **1. Blue Ridge Cancer Care:**

Their website has contact information for several oncology/hematology and radiation oncology offices in Roanoke and surrounding areas:

<http://www.visionefx.net/Blue%20Ridge/contact.htm#roanoke1>

#### **Hospices located in Roanoke, VA<sup>117</sup>:**

##### **1. Good Samaritan Hospice**

3825-A Electric Road

Roanoke, VA 24018

Phone: 540-776-0198

Toll Free: 888-466-0198

Fax: 540-776-0841

E-mail: [info@goodsamhospice.org](mailto:info@goodsamhospice.org)

Website: <http://www.goodsamhospice.org/index.htm>

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<sup>117</sup> The three hospices were found using a search of the database on the website of the National Hospice and Palliative Care Organization at: <http://www.nhpco.org/custom/directory/>

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Contacts: Ms. Suzanne Moore, MSN or Ms. Laura Garnett

2. Gentle Shepherd Hospice, Inc.  
4005 Electric Rd. SW  
Roanoke, VA 24014  
Phone: 540-989-6265  
Toll Free: 800-789-0586

Contacts: Mr. Don Eckenroth or Ms. Tracie McKenney

3. Carilion Hospice Services-Roanoke  
1917 Franklin Rd. SW, Suite B  
Roanoke, VA  
Phone: 540-224-4753  
Toll Free: 800-964-9300

Contacts: Ms. Linda Mercer Royal, RN, BS or Ms. Alyson Lawson, RN, BSN

**Bar Associations located in and serving Roanoke:**

1. Roanoke Bar Association  
P. O. Box 18183  
Roanoke, VA 24014  
Phone: (540) 342-4905  
Fax: (540) 342-1252  
Email: [roanokebar@earthlink.net](mailto:roanokebar@earthlink.net)  
President: Elizabeth K. Dillon  
President-Elect: Steven L. Higgs  
Executive Director: Cathy Caddy

2. Virginia State Bar  
707 E. Main Street, Suite 1500  
Richmond, Virginia 23219-2800  
Phone: (804) 775-0500  
Website: [www.vsb.org](http://www.vsb.org)

3. Virginia Bar Association  
701 E. Franklin St., Ste. 1120  
Richmond, VA 23219  
Phone: (804) 644-0041  
Website: [www.vba.org](http://www.vba.org)

**Major Law Firms in Roanoke<sup>118</sup>:**

1. Brumberg, Mackey and Wall, P.L.C.  
300 Professional Arts Bldg., 30 West Franklin Rd.  
P.O. Box 2470  
Roanoke, VA 24011  
Phone: 540-343-2956  
Web site: [www.bmwlaw.com](http://www.bmwlaw.com)  
There are six lawyers in this firm.

2. Glenn, Feldman, Darby & Goodlatte, P.C.  
210 1st Street S.W., Suite 200  
P.O. Box 2887  
Roanoke, VA 24001  
Phone: 540-224-8000  
Web site: [www. Gfdg.com](http://www.Gfdg.com)  
There are 11 lawyers in this firm

3. Gentry, Locke, Rakes & Moore  
Sun Trust Plaza  
10 Franklin Rd., S. E.  
Suite 800  
P.O. Box 40013  
Roanoke, VA 24022  
Phone: 540-983-9300  
Web site: [www.gentrylocke.com](http://www.gentrylocke.com)  
There are 51 lawyers in this firm.

**Churches in Roanoke<sup>119</sup>:**

1. There are six Lutheran churches with one as an example:  
Christ Lutheran Church  
2011 Brandon Ave. SW  
Roanoke, VA 24015  
Phone: (540) 982-8334

2. There are over 60 Baptist churches with one as an example:  
Blue Ridge Baptist Church  
974 Colonial Rd  
Blue Ridge, VA 24064  
Phone: (540) 977-2041

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<sup>118</sup> The firms were found using the search function at [www.martindale.com](http://www.martindale.com), a nationwide directory of lawyers and law firms.

<sup>119</sup> The churches were found using the search feature at: [www.usachurch.com](http://www.usachurch.com)

3. There are 21 Methodist churches with one as an example:

Grace United Methodist Church

4404 Williamson Rd., NW

Roanoke, VA 24012

Phone: (540) 366-0790

## **II. Mission Statement for Our Roanoke Nonprofit**

Based on the high incidence of cancer in the Roanoke Area, the low overall income of the area, and the current lack of legal services for the needs arising out of cancer, we devised the following purpose and mission:

### **Short Mission Statement:**

A nonprofit organization dedicated to providing cancer patients and their families in the greater Roanoke area with referrals for legal services and legal advice.

### **Detailed Mission Statement:**

The purpose of this organization will be to address the legal needs of cancer patients that arise out of, or are heightened by their illness and treatment. These needs may include filing for Medicare, securing Social Security and disability benefits, debt management, creation of wills, estate planning, employment disputes, and arranging for care and custody of children. We will provide these services through private attorneys either working pro-bono or on a sliding scale. The organization seeks to work hand in hand with other community organizations, such as medical and legal organizations, to serve the needs of cancer patients.



## CHAPTER 2 APPENDIX

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### *Sample Articles Of Incorporation And Sample By-Laws*

#### I. Sample Articles of Incorporation

**ARTICLES OF INCORPORATION**<sup>120</sup>  
**OF**  
\_\_\_\_\_, **INC.**,  
**A NONSTOCK CORPORATION**

The undersigned person(s), pursuant to Chapter 10 of Title 13.1 of the Code of Virginia of 1950, as amended, hereby adopt and set forth the following articles of incorporation:

##### **Article I – Name**

The name of the Corporation is \_\_\_\_\_ Inc.<sup>121</sup>

##### **Article II – Purpose and Powers**<sup>122</sup>

The Corporation is organized exclusively for charitable, religious, educational, or scientific purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986, as now enacted or hereafter amended, including, without limitation, the purposes of \_\_\_\_\_. The Corporation shall not be operated for the primary purpose of carrying on a trade or business for profit. The Corporation shall have all powers granted under Va. Code Ann. § 13.1-826 and any other applicable statute.

##### **Article III – Limitations**<sup>123</sup>

At all times, the following shall operate as conditions restricting the operations and activities of the Corporation:

1. No part of the net earnings of the Corporation shall inure to the benefit or be distributed to any private person except the Corporation shall be authorized to pay reasonable compensation for services rendered and to make payment and distributions in furtherance of the purposes set forth in Article II hereof;

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<sup>120</sup> Many provisions in the Sample Articles have been taken from Henry A. Hart, *Virginia Tax-Exempt Organizations—Organizational, Operational and Liability Considerations*, in TAX-EXEMPT ORGANIZATIONS, at III-5 to III-7, III-30 to III-33 (Virginia Law Foundation 2002).

<sup>121</sup> See VA. CODE ANN. § 13.1-829.

<sup>122</sup> This Article should set forth general tax exempt purposes of the nonprofit with appropriate language in light of the subsection of IRC § 501(c) under which exemption is sought. See IRS Publication 557.

<sup>123</sup> See IRS Publication 557.

2. No substantial part of the activities of the Corporation shall consist of carrying on propaganda, or otherwise attempting to influence legislation nor shall it in any manner or to any extent participate in or intervene in (including the publishing or distribution of statements), any political campaign on behalf of any candidate for public office; nor shall the Corporation engage in any activities that are unlawful under the applicable federal, state, or local laws; and
3. Notwithstanding any other provision of these Articles, the Corporation shall neither have nor exercise any power, nor shall it directly or indirectly engage in any activity that would (1) prevent it from obtaining exemption from federal income taxation as a corporation described in § 501(c)(3) of the Internal Revenue Code of 1986, as now enacted or hereafter amended, or (2) cause it to lose such exempt status.

#### **Article IV – Members**

The Corporation is to have no members.<sup>124</sup>

(In the case of a nonprofit with the goal of providing legal services to individuals and their family members afflicted with cancer, a non-membership organization is preferable. The individuals that the nonprofit serves will not be limited to members, but rather will extend to the public at large. Since such membership is not critical, it is preferable to not have members so as to preserve control and decision-making authority in the board of directors and to not have the additional expense of keeping up memberships.)

#### **Article V - Registered Office and Registered Agent<sup>125</sup>**

The address of the initial registered office of the Corporation in the Commonwealth of Virginia is located in the City of Roanoke, at \_\_\_\_\_ Roanoke, Virginia, and the name of its initial registered agent at such address is \_\_\_\_\_ [who is a resident of Virginia and (an initial director of the Corporation) *or* (a member of the Virginia State Bar)] *or* [which is a domestic or foreign stock or nonstick corporation, limited liability company, or registered limited liability partnership authorized to transact business in Virginia].

#### **Article VI - Principal Office**

The address of the principal office of the Corporation is located in the City of Roanoke, at \_\_\_\_\_, Roanoke, Virginia \_\_\_\_\_.

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<sup>124</sup> Alternatively, if the nonprofit is to have members: “The Corporation is to have the following class(es) of members: \_\_\_\_\_.” This Article should set forth any provisions designating the class(es) of members, stating the qualifications and rights of the members of each class and conferring, and limiting or denying the right to vote or provide in the articles that such provisions may be included in the Bylaws.

<sup>125</sup> See VA. CODE ANN. § 13.1-819(A)(5).

**Article VII - Directors**

The directors of the Corporation are to be elected or appointed by [manner in which directors are to be elected or appointed].<sup>126</sup> The number of directors constituting the initial Board of Directors is \_\_\_\_\_ (\_\_\_); and, the name and address of each such director is as follows:

| <u>NAME</u> | <u>ADDRESS</u> |
|-------------|----------------|
| _____       | _____          |
| _____       | _____          |
| _____       | _____          |

The number of directors may be amended as provided in the Bylaws of the Corporation.

**Article VIII – Dissolution<sup>127</sup>**

Upon the dissolution of the Corporation, assets shall be distributed for one or more exempt purposes within the meaning of § 501(c)(3) of the Internal Revenue Code of 1986, as now enacted or hereafter amended, or shall be distributed to the federal government, or to a state or local government, for a public purpose. Any such assets not so disposed of shall be disposed of by the Circuit Court of the city or county in which the principal office of the Corporation is then located, exclusively for such purposes or to such organization or organizations as said Court shall determine, which are organized and operated exclusively for such purposes.

Executed this \_\_\_\_ day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ Incorporator  
  
\_\_\_\_\_ 200\_

<sup>126</sup> If directors are to be elected by cumulative voting, it must be so stated. VA. CODE ANN. § 13.1-852. If director terms are to be staggered, it must be so stated. VA. CODE ANN. § 13.1-858. If directors are to be removed only for cause (as opposed to with or without cause), it must be so stated. VA. CODE ANN. § 13.1-860.

<sup>127</sup> See IRS Publication 557.

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Office of the Clerk  
State Corporation Commission  
Post Office Box 1197  
Richmond, Virginia 23218-1197

Re: Articles of Incorporation for \_\_\_\_\_ (the “Corporation”)  
Dear Sir or Madam:

Enclosed please find Articles of Incorporation for the Corporation and a check in the amount of Seventy-five and 00/100 Dollars (\$75.00).

Please record the Articles of Incorporation and return the certificate and receipt to me. Please call with any questions or comments you may have.

Sincerely,

\_\_\_\_\_

Enclosures – 2

## **II. Sample Bylaws**

Below are sample bylaws along with a discussion that would be appropriate for a legal aid society in Roanoke, Virginia. It is a non-membership society, since the legal services will be open to the general public that is suffering the financial consequences of cancer.

### **Article I – Name and Location**

- 1.1 The name of the Corporation shall be [Corporation].
- 1.2 The principal office of the Corporation shall be located within Roanoke, Virginia.

*The corporation must choose a legally available corporate name. It may be necessary to contact a lawyer or corporate name service in order to find an available name. It is important to re-reserve the name, if the corporation takes awhile to officially form, in order to ensure the availability. In addition to availability, the name must be distinguishable from the names of other corporations in Virginia.*

### **Article II – Purposes**

- 2.1 The purpose for which the Corporation is formed is [insert mission statement here] and any and all services that the Board of Directors sees fit.

*In addition to the mission statement, it is necessary to include a provision that will ensure that the corporation is consistent with the Internal Revenue Code §501(c)(3) tax exempt status. Additionally, after the mission statement it is important to include a “catch-all” phrase to allow for flexibility in the corporation.*

## **Article III – Board of Directors**

### **3.1 Powers & Duties**

#### 3.1.1 General Powers

The business and affairs of the Corporation shall be conducted under the direction of, and the control and disposal of, the Corporations’ properties and funds shall be vested in its Board of Directors, except as otherwise provided in the nonprofit corporation law of the Commonwealth of Virginia, the Corporation’s Articles of Incorporation, or these Bylaws.

#### 3.1.2 Duties

The Board of Directors is charged with (2) two primary duties: the Duty of Care and the Duty of Loyalty.<sup>128</sup>

*Duty of Care* requires board members to act (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interests of the Corporation.

*Duty of Loyalty* requires board members to pursue the Corporation’s best interest, whether over money or politics. The Duty of Loyalty prohibits a director from engaging in self-dealing unless there is full disclosure to the board and the transaction is clearly in the corporation’s best interest.

### **3.2 Number, Election, Term, and Qualifications**

#### 3.2.1 Number

There shall be no fewer than 3 and no more than 21 members of the Board.

#### 3.2.2 Terms and Term Limits

Each board member shall be elected at an annual meeting by the full board to serve a three-year term. The term is once renewable such that a board member may serve two consecutive three-year terms. Board members shall be divided into three classes to achieve a staggered rotation of terms.

*The minimum number of board members set at three allows the organization to begin to function as soon as it is incorporated. Providing an acceptable range of members allows for growth of*

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<sup>128</sup> Futter, Victor, Nonprofit Governance & Management, “Chapter 8: Duties and Potential Liabilities of Officers and Directors of Nonprofit Organizations”, 2002, pp. 84-87)

*the board over time. Setting a number divisible by (3) three affords the board an opportunity to set a rotation such that when 1/3 of the board is newly elected, 1/3 has completed a year of service, and 1/3 is serving the final year of a single term.*

### 3.2.3 Eligibility for Renewal

A board member who has completed two consecutive terms shall remain off the Board for one full year before being considered for board membership again. At this time, the former board member turned candidate is eligible to serve two consecutive terms again.

### 3.2.3 Qualifications

The Nominating/Board Development Committee shall propose a slate of members at the annual meeting of the Board upon giving due consideration the recommendations of such persons. The Board shall be comprised of members with consideration of, but not limited to, the following skills: business, development, finance, healthcare, human resources, legal, public relations and communications, and/or a general interest in cancer.

## 3.3 Attendance

3.3.1 In order to uphold the Duty of Care, it is expected that board members attend all regularly scheduled board meetings.

3.3.2 A board member who misses three consecutive meetings, unless excused, shall be deemed to have resigned. The office shall become vacant for the remainder of the term. The minutes should note any excused absences.

3.3.3 A board member may take a “leave of absence” for up to six months with approval from the Executive Committee. The board member must submit a request in writing with a justification for the leave. Examples of acceptable reasons for leave include but are not limited to: maternity, care for family members, personal health.

*In the case of this corporation which provides services to cancer patients and loved ones, it is highly likely that board members may be dealing with their own personal health concerns and may need to take time away from the corporation to deal with them.*

## 3.4 Nominating/Board Development

3.4.1 Board members may be reviewed and proposed by a Nominating/Board Development Committee appointed by the President/Chairman of the Board. The Nominating/Board Development Committee shall interview all board candidates and request a resume and/or application. When selecting candidates for presentation to the board, the Nominating/Board Development Committee shall give consideration to expertise, needs of the committees, demographics of the board, and other factors as deemed appropriate in addition to the candidate’s commitment to the mission of the Corporation.

3.4.2 To ensure that prospective board members are fully prepared to assume their duties, board members shall receive copies of the following materials:

(1) the mission statement of the Corporation, (2) the Articles of Incorporation, (3) the Bylaws, (4) the most recent annual report, (5) financial statements including the budget and tax filings of form 990, (6) policies, (7) expectations for meeting attendance and committee work, and (8) a list of current board members with complete contact information and committee designations.

3.4.3 Upon election to the Board, new members shall have the opportunity to participate in a board member orientation.

3.4.4 The Nominating/Board Development Committee shall be responsible for the ongoing training and development of the Board including an annual assessment of board performance. As such, the committee shall give consideration to board structure (board size, committees, etc.), inputs (board member skills and time), and processes (common vision, clear roles, and meeting practices).

### **3.5 Resignation and Vacancies**

#### 3.5.1 Resignations

A board member may resign at any time by providing written notice to the Board Chair, Secretary, or Executive Director.

#### 3.5.2 Board Vacancies

A director elected to fill a vacancy due to resignation shall be elected for the unexpired term of the predecessor. Vacancies may be filled at any time by the affirmative vote of a majority of the remaining directors then in office, even if it is less than a quorum.

### **3.6 Regular Meetings**

#### 3.6.1 Regular meetings

The Board of Directors shall meet no fewer than (9) nine times, including an annual meeting.

*During the formative stages of developing the corporation, the board will most likely meet monthly or perhaps more often. As the corporation becomes established, the board may elect to meet less often. For example, some corporations may choose to omit a meeting during the summer or winter seasons.*

#### 3.6.2 Definition of Annual Meeting

The annual meeting of the Board shall be the regular board meeting which occurs in April. The purpose of the meeting shall be to elect officers, board members, set the budget and calendar of meetings for the coming year, and any other business as set forth before the Board.

### 3.6.3 Special Meetings

The Board Chair may call a special meeting of the Board whenever deemed necessary or when requested to do so by (3) three or more directors or by the Executive Director. Notice of a special meeting shall be provided in writing to each board member at least (7) seven days in advance of the meeting.

### 3.6.4 Meeting Notification

The Board of Directors shall set the schedule of meetings for the coming year at the annual meeting. The schedule of meetings shall serve as proper notice. Meeting materials shall be prepared and distributed not later than the Friday before the meeting.

### 3.6.5 Rules of Order

Meetings shall be guided by specific parliamentary procedure as adopted by the Board of Directors.

## **3.7 Quorum and Voting**

### 3.7.1 Meeting quorum

A quorum exists if 2/3 of the members of the board are present for a meeting.

### 3.7.2 Voting

Each member of the Board shall have (1) one vote. An action may be passed by the Board at a meeting through an affirmative vote by the majority of those present.

### 3.7.3 Amendment to Bylaws

The bylaws may be amended with vote of a super majority of the Board. Proposed amendments must be submitted in writing to the Board prior to the meeting in which the vote is to be held.

## **Article IV – Officers and Agents**

### **4.1 Number and qualifications**

The board officers shall consist of a President, President-Elect, Immediate Past President, Secretary/Treasurer.

*The roles of president-elect and immediate past president provide for continuity and stability in the corporation. The immediate past president serves as a mentor to the president while the president-elect is continuously learning and preparing for the role of president.*

### **4.2 Election and Term of Office**

The Nominating/Board Development Committee shall present a slate of officers for the coming year for vote by the full board at the annual spring meeting.



## **4.6 Authority and Duties of Officers**

### **4.6.1 President**

The President of the Board shall serve a one-year term. The President is responsible for convening meetings and general oversight of board activities. The President appoints the Nominating/Board Development Committee and serves on the Personnel Committee.

### **4.6.2 President-Elect**

The President-Elect shall serve a one-year term with the expectation of assuming the role of President. In the event of the prolonged absence or disability of the President, the President-Elect shall have all the authority and duties vested in the President.

### **4.6.3 Immediate Past President**

The Immediate Past President serves on the Nominating/Board Development Committee and serves as a resource to the President. The Immediate Past President serves a one-year term of office.

### **4.6.3 Recording Secretary**

The Secretary of the Board shall ensure that proper notice is given for meetings, and is responsible for recording and distributing minutes of meetings. In the absence of the Secretary, the President shall appoint a person to act as Secretary at a particular meeting.

### **4.6.4 Treasurer**

The chairman of the finance committee serves as the Treasurer of the Board and as such, is a member of the Executive Committee. The Treasurer shall be responsible for submitting the annual budget for approval by the full Board. The proposed budget shall be presented for discussion at the meeting prior to the annual meeting. The budget shall be approved at the annual meeting. The Treasurer shall prepare the monthly financial reports to the Board, receive and make deposits, and make disbursements up to \$1,000. Disbursements over \$1,000 require the co-signature of the Board President. At the end of the term the Treasurer shall deliver to the successor all books, monies, and other property of the Corporation then in his or her possession.

## **Article V – Committees of the Board**

**5.3** The creation of committees shall be recommended by the Executive Committee to the full Board. Committees in addition to those listed below may include: program committee, resource development, public relations, and others as deemed necessary by the Board. The President of the Board may appoint committee chairs. The President of the Board may designate an ad hoc committee to carry out special projects within certain time parameters. For example, an anniversary planning committee or a long-range plans committee.

### **5.3.1 Executive Committee**

The Executive Committee shall be comprised of the officers of the Board and the chairmen of committees. The Executive Committee has authority to exercise all the

powers and functions of the board in the management and direction of the affairs of the Corporation. The Executive Committee of the Board shall hold a minimum of (4) four meetings per year outside of the regular board meetings and shall report on such meetings at the next regular meeting of the full Board.

#### 5.3.2 Committee Chairs

The committee chair holds the responsibility for convening meetings and ensuring that communication is upheld with the Board. The committee chair shall be appointed by the President of the Board.

#### 5.3.3 Nominating/Board Development Committee

The Nominating/Board Development Committee shall be appointed by the President of the Board. The Nominating/Board Development Committee shall recruit, interview, and present candidates for election to the Board at the annual spring meeting of the Board. The Nominating/Board Development Committee shall be responsible for maintaining a pool of potential board members, annual assessment of board performance, and board training.

#### 5.3.4 Audit Committee

The Audit Committee shall ensure that the financial reporting is in compliance with current statutes. The Audit Committee shall ensure that an annual audit is completed and that all tax forms are filed. Reports of the auditors and copies of tax forms shall be readily available to board members.

#### 5.3.5 Personnel Committee

At the point in time that the Corporation shall employ an executive director and/or other staff, the Personnel Committee shall set human resources policies. The Personnel Committee shall be responsible for the hiring and annual review of the Executive Director and serves as the last point of appeal in the grievance process.

### **Article VI – Advisory Council**

- 6.1** An Advisory Council may be appointed at the discretion of the President and the Executive Director to offer special expertise in the business, legal, or health aspects of dealing with cancer. The Advisory Council has no governing authority but represents interested parties who have demonstrated expertise or knowledge of the community but who may not be able to serve on a governing board for various reasons. The Advisory Council shall meet at least once per year. Otherwise, Advisory Council members may be available for consultation on an individual basis.

*An advisory council is not necessary but may enable the board to fulfill its governing duties to the corporation by providing technical expertise.*

## Article VII – Indemnity of Officers and Directors

- 7.1** Each person now or hereafter a director or officer of the Corporation (and his or her heirs, executors and administrators) shall be indemnified by the Corporation to the fullest extent permitted by the laws of the Commonwealth of Virginia (See Va. Code Ann. § 13.1-702) against all claims, liabilities, judgments, settlements, costs and expenses, including all attorney’s fees, imposed upon or reasonably incurred by him or her in connection with or resulting from any action, suit, proceeding or claim to which he or she is or may be made a party by reason of his or her being or having been a director or officer of the Corporation (whether or not he or she is a director or officer at the time such costs or expenses are incurred or imposed upon him or her), except in relation to matters as to which he or she shall have been finally adjudged in such action, suit or proceeding to be liable for gross negligence or willful misconduct in the performance of his or her duties as such director or officer.
- 7.2** Under Va. Code Ann. §13.1-697, the Corporation has the authority to indemnify an officer or director if 1) he conducted himself in good faith, and 2) he believed in the case of conduct in his official capacity with the Corporation, that his conduct was in its best interests; and in all other cases, that his conduct was at least not opposed to its best interests; and in the case of any criminal proceeding, he had no reasonable cause to believe his conduct was unlawful.

If the determination as to whether a director or officer was guilty of gross negligence or willful misconduct is to be made by the Board, it may rely as to all questions of law on the advice of independent counsel. Such right of indemnification shall not be deemed exclusive of any rights to which an officer or director may be entitled by any bylaw, agreement, vote of members, or otherwise. The Corporation shall have the authority to purchase suitable policies of indemnification insurance on behalf of its officers, directors, or agents, the premiums for which may be paid out of the assets of the Corporation

## Article VIII – Conflicts of Interest

### **8.1 Conflict Defined**

A conflict of interest exists when the interests or activities of any director, officer or staff member may be seen as competing with the interests or activities of the Corporation; or the director, officer, or staff member derives a financial or other material gain as a result of a direct or indirect relationship.

### **8.2 Disclosure**

Any conflict of interest shall be disclosed to the Board of Directors by the person who has the conflict. When the conflict relates to a matter requiring action by the Board of Directors, that person shall not participate in the discussion nor vote on the matter, but their presence may be counted if it is necessary in order to achieve the quorum.

*The National Charities Information Bureau requires that nonprofit organizations adopt a policy on conflicts of interest. The duty of loyalty, as discussed earlier, demands that a director or officer of a corporation act in the best interests of the corporation. If there is a conflict with a director, they must disclose their conflict and remove themselves from any votes pertaining to the matter in conflict. This article does not necessarily need to be included in the Bylaws because it can be adopted as a policy by the Board of Directors instead.*

### **Article IX – Account Books and Minutes**

- 9.1** The Corporation shall keep correct and complete books and records of account and financial statements and shall also keep minutes of the proceedings of its Board of Directors and Committees. All books and records of the Corporation may be inspected by any director or his or her accredited agent or attorney, for any proper purpose at any reasonable time. The minutes will be entrusted to [a member of the Board] and will be kept [in a particular place]. In accordance with the IRS laws, the minutes will be made available to the public upon request. Additionally, the minutes will be emailed to all the Board of Directors to go over, so at the next meeting, the Board can agree to their accuracy.

*The minutes will be reviewed by the board and the board must agree to their veracity because the board is ultimately responsible for the operations and governance of the corporation.*

### **Article X – Fiscal Year and Audit**

- 10.1** The fiscal year of the Corporation shall be January 1 through December 31, inclusive. After the close of each fiscal year of the Corporation, financial transactions of the Corporation for the preceding fiscal year shall be reviewed by certified public accountants, as directed by the Board of Directors, and a report of the review shall be made to the Board of Directors within ninety days after the close of the fiscal year.

### **Article XI – Loans to Directors and Officers**

- 11.1** The law of the Commonwealth of Virginia prohibits any loans or advances, other than customary travel advances, to be made by the Corporation to any of its directors or officers.

### **Article XII – Amendment to Bylaws**

- 12.1** These Bylaws may be amended or repealed in whole or in part by a supermajority vote (over two thirds) of the active members present and voting at any special or regular meeting of the Corporation, provided that 14 days notice of the proposed amendment or repeal be given in the call for such meeting.

*(The ability to pass amendments to the by-laws is necessary so that your corporation will have the flexibility necessary to adjust to the organization's needs. There may be specifications for amendments in the Articles of Incorporation to allow for amendments. Rather than the*

*majority vote necessary to approve normal business decisions, amendment of the by-laws should require a supermajority vote in order to make sure that the organization's rules and structure cannot be altered too easily.)*

### Bylaws Certificate

The undersigned certifies that he/she is the Secretary of [name of corporation], a Virginia nonprofit corporation, and that, as such he/she is authorized to execute this certificate on behalf of said Corporation, and further certifies that the foregoing Bylaws, consisting of \_\_\_\_\_ (\_\_\_) pages, including this page, constitute the Bylaws of the Corporation as of this date, duly adopted by the [members or directors, depending on whether articles of incorporation specify members or directors are entitled to adopt bylaws], of the Corporation at their [date] [annual, special, or regular] meeting, as amended from time to time prior to the date hereof.

Dated: [date]

[Signature of Secretary]

[Name of Secretary], Secretary

## CHAPTER 4 APPENDIX: EMPLOYEE AND PERSONNEL ISSUES

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### *Recommended Policies and Example of an Employee Handbook*<sup>129</sup>

1. **Employee Acknowledgement:** it is the employee's responsibility to read and understand the company's policies.
  - a. Recommended that the employer set aside time for the employees to read the handbook during the orientation process. Encourage the asking of questions.
2. **Introduction to the Employee Handbook:** includes a welcoming message as well as a description of the company, its mission, values and beliefs.
  - a. Provide a few key statements so that employees have the opportunity to learn about the company.
  - b. Can also include additional items on the history of the company.
3. **Equal Opportunity Explanation:** incorporates a statement on the company's equal employment opportunities.
4. **General Policies:**
  - a. Personal information: requirements for personnel records such as proof of identity.
  - b. Attendance policy
    - i. Keep in mind laws and regulations such as FMLA. Best to just include a general statement on attendance.
  - c. Use of Company Property: such as copy machines, phones, supplies, etc.
    - i. Permit reasonable use as long as it does not interfere with business.
    - ii. Keep in mind restrictions on Internet access.
  - d. Confidentiality: some companies might have a need for employees to sign a confidentiality statement as a condition to employment. Some companies only require this if the employee is privy to confidential information.
  - e. Dress Code
  - f. Safety and Accident rules: an employer needs to provide a safe work environment and notify the employees that it is part of their responsibility to work safely.
    - i. Good idea to also have periodic training for employees on things such as escape routes and fire drills.
  - g. Anti Substance Abuse
    - i. This can get lengthy and technical due to the medical and legal issues involved. Best to just outline the policy in the handbook and then refer to a more complete document.
  - h. Sexual Harassment: employment attorney's place this on the must have list.
  - i. Smoking: consider local state laws as many have passed laws that govern the issue of smoking.

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<sup>129</sup> Online Women's Business Center at [http://www.onlinewbc.gov/docs/manage/hrpol\\_idx.html](http://www.onlinewbc.gov/docs/manage/hrpol_idx.html).

- j. Performance Reviews: what employees can expect.
  - i. This is essential to protecting the company in the event that an employee has to be terminated.
- k. Employment Categories: where to explain who is full time, part time, etc.
  - i. Critical in the determination of benefits and vacations, etc.
- l. Additional Policies: can change and be added as the business grows or changes.

## **5. Compensation and Benefits Policies**

- a. Payroll: outline payroll procedures.
- b. Work Hours and Reporting: outline policy when it comes to specific or flexible work hours.
- c. Holidays: typically small businesses start out with unpaid time off for holidays and then gradually add paid holidays.
- d. Vacation: this can be a problem for a small business with few employees.
- e. Sick Leave
  - i. Currently no legal requirements for paid sick leave unless the company is subject to FMLA (generally has 50 or more employees).
- f. Family and Medical Leave: professional legal help may be needed for drafting of this policy.
- g. Maternity Leave
- h. Funeral Leave
- i. Jury Duty
- j. Military Service
- k. Group Insurance Benefits: make a summary reference to the companies insurance benefits and eligibility, then refer the employee to the separate benefits handbook.
  - i. Your chosen insurance company will either provide you with or help you prepare detailed information about benefits.
- l. Short Term Disability: (if applicable)
  - i. Many companies offer optional long term disability insurance and short term disability insurance covers the employee during the gap between the two insurance policies.
  - ii. Companies with 15 or more employees are subject to the American's with Disabilities Act.
- m. Continuation of Medical/COBRA: if your company has grown to 20 more employees the law requires that you provide continuation of health/medical benefits to employees that leave the company in most circumstances.
- n. Workers Compensation: generally employers are required to have this insurance in most states.
- o. Retirement Plans
  - i. Keep in mind low cost options for small businesses.
- p. Tuition Assistance
- q. Employee Assistance Program
  - i. Helps employees recognize and deal with problems in their lives.
- r. Other Benefits: to be added as your company grows and changes.

## Sample Job Descriptions

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### XYZ Organization, Executive Director

#### Job Description

##### Staff Recruitment/Development/Supervision

Act as the staff's primary advocate for all organization issues through established staff and volunteer structures. Ensure compliance with policies and procedures. Provide staff performance management through individual goal development, constructive and continual feedback, and discipline, in accordance with established timelines. Recruit and develop individuals possessing the talent, experience, and qualifications required to meet goals and objectives as established by the Board of Directors.

##### Volunteer Recruitment

Ensure key volunteers attend training sessions. Ensure priority events and committees are in place within timelines. Expand organization's presence in the community through researching and developing volunteer resources for all priority initiatives. Serve as a staff resource for assigned volunteer committees and boards, and interpret policies for volunteers. Staff all operating boards; ensure adherence to operating board guidelines. Target and coordinate contacts and opportunities for all volunteers and staff.

##### Development

Adhere to priority special event standards and best practices. Compile accurate income projections and income reports as requested by Board of Directors. Conduct priority special event assessments in coordination with Director of Development. Ensure all priority special events are achieving benchmarks in accordance with event timelines. Lead annual goal planning and three-year planning process in all Board Committees within region. Serve as a primary staff resource for meeting major gift goals for assigned region. Work with Director of Development to identify and pursue income development opportunities.

##### Information Network

Ensure all activities are directly tied to organizations annual programs. Ensure all organization activities are achieving benchmarks in accordance with stated timelines. Manage all programs for the region.

##### Advocacy

Coordinate volunteers for information meetings. Inform others about the service of XYZ . Ensure the successful implementation of specific Area advocacy activities. Promote, coordinate, and support opportunities for active volunteer involvement in advocacy initiatives supported by



the Board of Directors. Support the meaningful dissemination of advocacy information, promote attitudes of political efficacy, and increase organizing efforts to enhance levels of participations.

#### **Job Requirements**

Bachelor's degree, and five to seven years management experience including fundraising, knowledge of volunteer recruitment, staff and volunteer training, and supervision in a related field of work, or an equivalent combination of education and experience. Demonstrated ability in fundraising, public relations, communications, project management, and community organization. Strong initiative and leadership skills; collaboration and integrated planning experience. Excellent interpersonal, written, and verbal communication skills. Demonstrated ability to influence others.

Reports to Chair of the Board of Directors.

## **XYZ Organization, Client Services Director**

### **Job Description**

#### Staff and Volunteer Relations

Provide staff and volunteers with the leadership, guidance, direction, and material resources to effectively implement organization client service programs in accordance with the overall policies, priorities, and objectives of the organization and organizational activities in the assigned area. Provide training for office staff and volunteers regarding call-in client services. Recruit, train, coordinate, motivate, and recognize volunteers for service programs. Maintain and strengthen staff and volunteer partnership team. Work with staff partners to identify and prioritize volunteer needs. Develop and implement systems/tools for aiding in volunteer retention, and quality of service offered by volunteers. Recruit, train, empower, and guide community volunteer committees to effectively achieve client service goals as determined annually.

#### Client Services

Acquire intimate knowledge of community resources; identify centers of influence. Answer client service policy questions (e-mail, phone, fax) using provided resources. Establish volunteer group to conduct outreach to providers to increase numbers of clients served. Maintain focus on region/area program of work.

#### Job Requirements

Bachelor's Degree in Social Work, Public Health, Law, Public Administration, or related field; or a combination of education and experience. Demonstrated ability to work with individuals from all walks of life including clients, family members, professionals, social workers, and volunteers. Excellent verbal and written communication skills. Experience in volunteer management and social work. Moderate travel within assigned geographic area. Reports to Executive Director.

## **XYZ Organization, Director of Development**

### **Job Description**

#### Staff Development

Ensure compliance with organizations policies and procedures. Deliver training related to donor identification and development to staff and volunteers as needed.

#### Development

Ensure that assigned areas continuously build capacity to increase and sustain growth in giving through assigned staff and volunteers. Ensure the successful implementation of all activities related to Development. Implement business methodologies for achievement of all Development goals and objectives. Identify and build relationships with prospective donors who have potential interest in supporting the organization. Qualify prospects and leads utilizing timely follow-up process including direct personal visitation, telephone, and other correspondence. Secure gift commitments. Assist in evaluating the acceptance of potential gifts including non-cash gifts of tangible or real property. Proven record of writing grant proposals a must. Reports to Executive Director.

#### Job Requirements

Bachelor's degree, and three years experience in Development, or an equivalent combination of education and experience. Demonstrated excellence in sales. Demonstrated excellence in cultivating and building relationships. Demonstrated knowledge of Development gift vehicles and methodologies. Demonstrated knowledge of tax laws (state and federal) and legal aspects related to charitable giving. Demonstrated ability to influence community and business leaders through strong presentation skills. Demonstrated excellence in interpersonal, written and verbal communication skills. Demonstrated strong initiative and leadership skills; collaboration and integrated planning experience. Demonstrated ability to interact and build relationships with people at all levels of society. Ability to adapt to changing environment.

## **XYZ Organization, Finance Director**

### **Job Description**

The Finance Director is responsible for providing the organization with budget development, fiscal oversight, financial reporting and bookkeeping, and for developing and maintaining efficient and effective fiscal operations and procedures. The Finance Director works under the direct supervision of the Executive Director.

#### **A. Responsibilities**

##### **1. Fiscal Operations and Oversight**

- Work closely with the Executive director to oversee the annual budget, including developing, revising, and reporting on the budget,
- Provide leadership in the development of budgets,
- Maintain and continually improve a fiscal operations system that reflects and accommodates for organizational financial complexity and that supports the development and management of budgets and production of reports and analyses, and
- Be responsible for proactive communication and reporting on fiscal matters to Executive Director.

##### **2. Reporting**

- Prepare timely and accurate monthly profit & loss and balance sheet reports for the Executive Director,
- Prepare financial reports for the Board of Directors, as guided and directed by the Executive Director,
- Prepare other financial multi-year financial projections as needed and directed, and
- Prepare financial analyses as needed and directed.

##### **3. Bookkeeping and Accounting**

- Reconcile all accounts and allocate all expenses,
- Oversee payroll process,
- Maintain financial procedures and controls for fiscal operations and ensure appropriate controls and security are in place,
- Work with out side auditor to prepare and complete annual audit in a timely manner; maintain organized records to ensure fiscal accountability, and
- Other assigned duties as required.

#### **B. Qualifications**

1. Strong fiscal management skills
2. Three to five years experience
3. Knowledge of nonprofits and tax law

4. Bachelor's degree in accounting, and/or related experience, CPA preferred.
5. Strong organizational skills.

### **Where to Advertise**

Position descriptions can be publicly advertised in the Help Wanted section of The Roanoke Times newspaper ([www.roanoke.com](http://www.roanoke.com)). In addition to publicly soliciting volunteer assistance, you may also find the following resources helpful channels for reaching prospective volunteer workers:

#### United Way of Roanoke Valley

[www.uwrv.org](http://www.uwrv.org)

The United Way, in partnership with the Council of Community Services, a United Way Partner Agency, maintains several large on-line databases listing numerous volunteer opportunities in the Roanoke region. These databases include the “Volunteer Roanoke Valley” (<http://www.councilofcommunityservices.org/vrv/vrv.htm>), and “The Retired and Senior Volunteer Program” (<http://www.councilofcommunityservices.org/rsvp/rsvp.htm>)—excellent Resources for organizations seeking to be matched with volunteer assistants.

#### Points of Light Foundation & Volunteer Center National Network

[www.pointsoflight.org](http://www.pointsoflight.org)

The Points of Light Foundation (Foundation) is a nonpartisan and nonprofit organization that supports and organizes the vital work of community volunteers who help serious social problems by bringing people and resources together. The Foundation raises public awareness about the urgent need to solve serious social problems through volunteering; builds knowledge, skills and programs for volunteers to succeed; and provides leadership to mobilize volunteers in thousands of local communities across the country. The Foundation has organized the following volunteer resources:

#### Corporate Volunteer Councils (CVCs)

CVCs are local business networks of workplace volunteer program managers bringing area business people together to share, learn and participate in volunteering with one another. Currently, nearly 100 CVCs exist across the United States, and it is estimated that over 2,500 businesses are members of this CVC network. Typically, CVCs are affiliated with local nonprofit organizations such as Volunteer Centers or United Way agencies while some councils are incorporated as freestanding nonprofit organizations. To learn more about CVCs in the Roanoke area, email [CVC@PointsofLight.org](mailto:CVC@PointsofLight.org) (note: the United Way of Roanoke Valley is one participating organization).

#### Connect America

Connect America, an initiative of the Foundation, is a national partnership of diverse nonprofit organizations, businesses, civic associations, fraternal organizations,

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communities of faith, and government agencies—working in collaboration to leverage knowledge, resources and volunteers to address social and community problems. For more information, email [ConnectAmerica@PointsofLight.org](mailto:ConnectAmerica@PointsofLight.org).

Volunteer Centers

Volunteer Centers mobilize people and resources to deliver creative solutions to community problems. A Volunteer Center is a convener for the community, a catalyst for social action and a key resource for volunteer involvement. The Volunteer Center's core identity is centered around bringing people and community needs together through a range of programs and services. The Volunteer Center's role is not to replace other agencies or organizations within the community, but rather to bridge the gap in services provided by agencies. To find the Volunteer Center in the Roanoke community, call or visit [1-800-VOLUNTEER.org](http://1-800-VOLUNTEER.org) or call Volunteer Roanoke Valley at 540-985-0131 ext. 501.

## EXAMPLE OF EMPLOYEE HANDBOOK

### XYZ Organization, Inc.<sup>130</sup> EMPLOYEE HANDBOOK

This employee handbook has been prepared for your information and understanding of the policies, philosophies and practices and benefits of XYZ Organization. PLEASE READ IT CAREFULLY. Upon completion of your review of this handbook, please sign the statement below, and return to your personnel representative by the due date. A reproduction of this acknowledgment appears at the back of this booklet for your records.

I, \_\_\_\_\_, have received and read a copy of the XYZ Organization (The Organization) Employee Handbook which outlines the goals, policies, benefits and expectations of The Company, as well as my responsibilities as an employee.

I have familiarized myself, at least generally, with the contents of this handbook. By my signature below, I acknowledge, understand, accept and agree to comply with the information contained in Employee Handbook provided to me by The Organization. I understand this handbook is not intended to cover every situation which may arise during my employment, but is simply a general guide to the goals, policies, practices, benefits and expectations of The Organization.

I understand that The Organization Employee Handbook is not a contract of employment and should not be deemed as such, and that I am an employee at will.

\_\_\_\_\_  
(Employee signature)

Please return by: \_\_\_\_\_  
(put date here)

<sup>130</sup> Online Women's Business Center at [http://www.onlinewbc.gov/docs/manage/hrpol\\_idx.html](http://www.onlinewbc.gov/docs/manage/hrpol_idx.html).

**XYZ Organization, Inc.  
EMPLOYEE HANDBOOK**

Dear Employee,

Welcome to XYZ Organization!

We are excited to have you as part of our progressive team. You were hired because we believe you can contribute to the achievement of our goals and to the bottom line of success, and share our commitment to our mission statement.

XYZ is committed to distinctive quality and unparalleled customer service in all aspects of our business. As part of the team, you will discover that the pursuit of excellence is truly a rewarding aspect of your career with XYZ.

This employee handbook contains the key policies, goals, benefits, and expectations of XYZ Organization; and other information you will need as part of our team.

***Our mission statement:***  
*At XYZ, we pledge to provide distinctive quality and unparalleled customer service as we strive to gain the respect and trust of our customers, suppliers and partner vendors.*

The success of XYZ is determined by our success in operating as a unified team. We have to earn the trust and respect of our customers every day in order that the customer make the decision to choose our services. We sell service and service is provided by people. There are no magic formulas.

Our success is guaranteed by creative, productive employees who are empowered to make suggestions while thinking "outside the box." Your job, every job, is essential to fulfilling our mission to "provide distinctive quality and unparalleled customer service" everyday to more people who "trust and respect" us. The primary goal at XYZ, and yours, is to live our mission statement and continue to be an industry leader. We achieve this through dedicated hard work and commitment from every employee.

You should use this handbook as a ready reference as you pursue your career with XYZ. Additionally, the handbook should assure good management and fair treatment of all employees. At XYZ, we strive to recognize the contributions of all employees.

Welcome aboard. We look forward to your contribution.

Sincerely,



## **PURPOSE OF THIS HANDBOOK**

This Handbook contains official policies of XYZ Organization, as of April 22, 2005, superseding all other statements of policy including handbooks prepared and distributed by any department of organization.

This Handbook is provided for guidance only, and is not meant to create a binding contract. Policies are under continuous review and are subject to change without notice.

For further details on current personnel policies and employee benefits, contact the Human Resource Department. Employees should not rely on oral statements by supervisors or other persons concerning policies, benefits or conditions of employment.

### **Equal Opportunity**

XYZ Organization, Inc. is an Equal Opportunity Employer. This means that we will extend equal opportunity to all individuals without regard for race, religion, color, sex, national origin, age, disability, handicaps or veterans status. This policy affirms XYZ's commitment to the principles of fair employment and the elimination of all vestiges of discriminatory practices that might exist. We encourage all employees to take advantage of opportunities for promotion as they occur.

### **Personnel Records**

It is important that the personnel records of XYZ be accurate at all times. In order to avoid issues or compromising your benefit eligibility or having W2's returned, XYZ expects that employees will promptly notify appropriate personnel representative of any change in name, home address, telephone number, marital status, number of dependents, or any other pertinent information which may change.

### **Attendance**

Employees are expected to arrive at work before they are scheduled to start and be at their work station productively engaged in XYZ business by the scheduled start time. All time off must be requested in advance and submitted in writing, as outlined in the appropriate categories; except sick leave. See Sick Leave and other categories for specific details.

XYZ views attendance as one of the most important facets of your job performance review. All unapproved absences will be noted in the employee's personnel file. Excessive absences, including for Sick Leave, will result in disciplinary action, up to and including termination.

### **Equipment**

XYZ will provide you with the necessary equipment to do your job. None of this equipment should be used for personal use, nor removed from the physical confines of XYZ - unless it is

approved and your job specifically requires use of organization equipment outside the physical facility of XYZ.

Computer equipment, including laptops, may not be used for personal use - this includes word processing and computing functions. It is forbidden to install any other programs to a organization computer without the written permission of the department head. These forbidden programs include, but are not limited to, games, online services, screen savers, etc. The copying of programs installed on the organization computers is not allowed unless you are specifically directed to do so in writing by your supervisor.

The telephone lines at XYZ must remain open for business calls and to service our customers. Employees are requested to discourage any personal calls - incoming and outgoing - with the exception of emergency calls. No long distance calls are to be made on organization phones which are not strictly business related.

### **Confidentiality**

XYZ requires all employees to sign a confidentiality agreement as a condition of employment, due to the possibility of being privy to information which is confidential and/or intended for the organization use only. All employees are required to maintain such information in strict confidence. This policy benefits you, as an employee, by protecting the interests of The Organization in the safeguard of confidential, unique and valuable information from competitors or others.

Should an occasion arise in which you are unsure of your obligations under this policy, it is your responsibility to consult with your reporting manager. Failure to comply with this policy could result in disciplinary action, up to and including termination.

### **Dress Code**

As an employee of XYZ, we expect you to present a clean and professional appearance when you represent us, whether that is in, or outside of, the office. Management, sales personnel and those employees who come in contact with our public, are expected to dress in accepted corporate tradition. A specific list of suggested do's and definite don'ts, including a specific definition of business casual, is available from your personnel representative and will be posted in each work area.

It is just as essential that you act in a professional manner and extend the highest courtesy to co-workers, visitors, customers, vendors and clients. A cheerful and positive attitude is essential to our commitment to extraordinary customer service and impeccable quality.

### **Safety and Accident Rules**

Safety is a joint venture at XYZ. XYZ provides a clean, hazard free, healthy, safe environment in which to work in accordance with the Occupational Safety and Health Act of 1970. As an employee, you are expected to take an active part in maintaining this environment. You should

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observe all posted safety rules, adhere to all safety instructions provided by your supervisor and use safety equipment where required. Your work place should be kept neat, clean and orderly. It is your responsibility to learn the location of all safety and emergency equipment, as well as the appropriate safety contact phone numbers. A copy of the Emergency Procedures will be kept in each work area on top of the supervisor's desk.

All safety equipment will be provided by XYZ, and employees will be responsible for the reasonable upkeep of this equipment. Any problems with or defects in, equipment should be reported immediately to management.

As an employee, you have a duty to comply with the safety rules of XYZ, assist in maintaining the hazard free environment, to report any accidents or injuries - including any breaches of safety - and to report any unsafe equipment, working condition, process or procedure, at once to a supervisor.

Employees may report safety violations or injuries anonymously to the Safety Committee, if they are not the injured or violating party. **NO EMPLOYEE WILL BE PUNISHED OR REPRIMANDED FOR REPORTING SAFETY VIOLATIONS OR HAZARDS.** However, any deliberate or ongoing safety violation, or creation of hazard, by an employee will be dealt with through disciplinary action by XYZ, up to and including termination.

All work related accidents are covered by Worker's Compensation Insurance pursuant to the laws of the various states in which we operate.

### **Anti-Substance Abuse**

XYZ takes seriously the problem of drug and alcohol abuse, and is committed to provide a substance abuse free work place for its employees. This policy applies to all employees of XYZ, without exception, including part-time and temporary employees.

No employee is allowed to consume, possess, sell or purchase any alcoholic beverage on any property owned by or leased on behalf of XYZ, or in any vehicle owned or leased on behalf of XYZ. No employee may use, possess, sell, transfer or purchase any drug or other controlled substance which may alter an individual's mental or physical capacity. The exceptions are aspirin or ibuprofen based products and legal drugs which have been prescribed to that employee, which are being used in the manner prescribed.

XYZ will not tolerate employees who report for duty while impaired by use of alcoholic beverages or drugs.

All employees should report evidence of alcohol or drug abuse to a supervisor or a personnel representative immediately. In cases where the use of alcohol or drugs pose an imminent threat to the safety of persons or property, an employee must report the violation. Failure to do so could result in disciplinary action for the non-reporting employee.

Employees who violate the Anti-Substance Abuse Policy will be subject to disciplinary action, including termination. It is our policy at XYZ to assist employees and family members who suffer from drug or alcohol abuse. You may be eligible for a medical leave of absence, and we encourage any employee with a problem to contact your personnel representative for details.

As a part of our policy to ensure a substance abuse free workplace, XYZ employees may be asked to submit to a medical examination and/or clinically tested for the presence of alcohol and/or drugs. Within the limits of federal and state laws, we reserve the right, at our discretion, to examine and test for drugs and alcohol. Some such situations may include, but not be limited, to the following:

1. All employees who are offered employment with XYZ;
2. Where there are reasonable grounds for believing an employee is under the influence of alcohol or drugs;
3. As part of an investigation of any accident in the workplace in which there are reasonable grounds to suspect alcohol and/or drugs contributed to the accident;
4. On a random basis, where allowed by statute;
5. As a follow-up to a rehabilitation program, where allowed by statute;
6. As necessary for the safety of employees, customers, clients or the public at large, where allowed by statute; and
7. When an employee returns to duty after an absence other than from accrued time off such as vacation or sick leave.

This is only a summary of XYZ's Anti-Substance Abuse Policy. You have been provided, and are required to read, the full policy. The full policy goes into greater detail and includes such subjects as definitions, testing methods, consequences of testing refusal, confidentiality, rights of employees and The Organization, appeal procedures, notice of applicable statutes, voluntary assistance, etc. It is your responsibility to obtain a copy from your personnel representative if one has not been provided to you. You will be required to sign a consent form agreeing to XYZ's Anti-Substance Abuse Policy in full.

It is a condition of your continued employment with XYZ that you comply with the Anti-Substance Abuse Policy. **NOTHING IN THE ANTI-SUBSTANCE ABUSE POLICY SHALL BE CONSTRUED TO ALTER OR AMEND THE AT-WILL EMPLOYMENT RELATIONSHIP BETWEEN XYZ AND ITS EMPLOYEES.**

### **Sexual Harassment**

XYZ Organization will not, under any circumstances, condone or tolerate conduct which may constitute sexual harassment on the part of its management, supervisors or non-management personnel. It is our policy that all employees have the right to work in an environment free from any type of illegal discrimination, including sexual harassment. Any employee found to have engaged in such conduct will be subject to immediate discipline up to and including discharge.

Any employee found to be engaged in the conduct of sexual harassment will be subject to immediate discipline up to and including discharge.

Sexual harassment is defined as:

1. Making submission to unwelcome sexual advances or requests for sexual favors a term or condition of employment;
2. Basing an employment decision on submission or rejection by an employee of unwelcome sexual advances, requests for sexual favors or verbal or physical contact of a sexual nature;
3. Creating an intimidating, hostile or offensive working environment or atmosphere either by
  - a) verbal actions, including calling employees by terms of endearment; using vulgar, kidding or demeaning language; or
  - b) physical conduct which interferes with an employee's work performance.

We, at XYZ, do encourage healthy fraternization among its employees; however, employees, especially management and supervisory employees, must be sensitive to acts of conduct which may be considered offensive by fellow employees and must refrain from engaging in such conduct.

It is, also, expressly prohibited for an employee to retaliate against employees who bring sexual harassment charges or assist in investigating charges. Retaliation is a violation of this policy and may result in discipline, up to and including termination. No employee will be discriminated against, or discharged, because of bringing or assisting in the investigation of a complaint of sexual harassment.

### **Smoking Policy**

XYZ endeavors to provide a healthy environment, therefore prohibits any form of tobacco consumed in organization buildings. Additionally, no smoking is allowed within ten (10) feet of exterior entranceways.

### **Job Objectives, Performance Reviews, Salary Reviews**

Within one week of employment, job change or promotion, every employee will be given job objectives which detail the requirements and expectations of the position for which the employee was hired. XYZ will measure your job performance against these objectives. After every evaluation, job objectives will be re-dated and reviewed, if no changes are made; or rewritten as appropriate. In either case, the reporting supervisor review and discuss the objectives with the employee and the employee will sign a statement indicating agreement with, and understanding of, these objectives.

Performance reviews are normally conducted every six (6) months from the date of hire, with the exception of a three month review at the end of your probationary period. All performance reviews are based on merit, achievement, job description fulfillment and performance at your position. Wage increases will be based upon this review, as well as past performance improvement; dependability; attitude; cooperation; any necessary disciplinary action; adherence

to all employment policies; and your position in your salary range. Your reporting supervisor will review and discuss your salary range and your position within that range during your performance reviews. When you are promoted to a higher level position, you are automatically eligible for an increase as dictated by the salary range of that position.

### **Employment Categories**

Permanent Full-Time is an employee who has no termination date and who is regularly scheduled to work 37.75 to 40 hours per week.

Permanent Part-Time is an employee whose position has no termination date and who is scheduled to work 20 or more hours, but less than 37.75 hours per week.

Temporary Full-Time is an employee who is hired or promoted for certain length of time and who is scheduled to work 37.75 hours per week.

Temporary Part-Time is an employee who is hired or promoted for a certain length of time and who is scheduled to work 20 hour or more, but less than 37.75 hours per week.

Eligibility for Overtime Pay under the Fair Labor Standards Act.

The Fair Labor Standards Act of 1938 (FLSA) established the expectation that American workers would have a normal workweek of 40 hours. For most workers, it guarantees the right to overtime pay—"time and a half"—for each hour beyond 40 worked in a week. In 1999, the U.S. Department of Labor estimated that almost 80% of the nation's 120 million wage and salary workers were entitled to overtime protection under the FLSA.<sup>1</sup>

Section 13(a)(1) of the FLSA states that the obligation of employers to pay an overtime pay premium (or even the minimum wage) for each hour beyond 40 worked per week does not apply to "any employee employed in a bona fide executive, administrative, or professional capacity." The regulations to implement that exemption have been in place since 1940, with few significant changes, except to the dollar amount of the salary-level test.

Qualifying for exempt status generally requires meeting three tests: (1) the amount of salary paid must meet minimum specified amounts (the "salary-level test"); (2) the employee must be paid a predetermined and fixed salary, not an hourly wage that is subject to reductions because of variations in the quality or quantity of work performed (the "salary basis test"); and (3) the employee's job duties must primarily involve managerial, administrative, or professional skills as defined by FLSA regulations (the "duties tests").

On March 31, 2003, the Department of Labor's Wage and Hour Administrator issued a Notice of Proposed Rulemaking to change the regulations governing the right to overtime pay for "white-collar" employees.<sup>131</sup>

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<sup>131</sup> Economic Policy Institute-Eliminating the Right to Overtime Pay at [http://www.epinet.org/content.cfm/briefingpapers\\_flsa\\_jun03](http://www.epinet.org/content.cfm/briefingpapers_flsa_jun03).

## **Payroll**

XYZ employees are paid bi-weekly. Our payroll process includes:

### **Direct Deposit**

While an employee can certainly have his/her actual pay check delivered direct to their desk each pay period, XYZ provides, and encourages, direct deposit of paychecks. This is a service which saves you time and provides added security. With this option, each paycheck will be automatically deposited to your checking or savings account (or divided between the two) as your direct. Each pay day, you still receive a pay stub for your records -- much like a voided check with all the same information which would appear on your regular check -- except the face of the check is voided. No trips to the bank are necessary because your salary appears in your bank account on payday, or in some cases the night before. Direct Deposit will be initiated one pay period following the receipt of the signed authorization form from the employee.

### **Payroll Deductions**

As required by law, XYZ will deduct Federal Social Security and Income Tax from your payroll check each pay period. Group Insurance premiums for eligible employee and dependent family members will be deducted from payroll check each pay period, once the employee completes the appropriate authorization forms.

## **Work Hours and Reporting**

### **Workday**

The normal workday is eight (8) hours for non-exempt, with 40 hours being a normal work week. Exempt employees generally work the same hours, but may be required to work more hours as the work dictates. While you are generally expected to work the number of hours stated above, XYZ does not guarantee that you will actually work that many hours in any given day or week (or to be paid for such hours if you do not work that many hours).

Overtime work is only performed when necessary and approved in advance by your department head. You are expected to work necessary overtime when requested to do so, and non-exempt employees will receive time and one-half pay for time worked exceeding 40 hours in any given work week. Full time employees will be paid double time for hours worked on a organization holiday, if they are not scheduled to work on that holiday. Part-time employees will be paid one and one-half times the regular rate of pay for working on a organization holiday. Exempt employees are not entitled to overtime pay. All overtime payments will be made in the pay period following the period the overtime was worked.

### **Time Clock and Time Cards**

Where applicable, XYZ employees must punch in before beginning their work shift and punch out at the end of their shift. All such employees are expected to work their entire shift. Any such employee punching five (5) minutes late will be docked fifteen (15) minutes of pay, or punches out later than the time their scheduled shift ends, without prior authorization, will be paid for the scheduled time only. Any digression from the above requirements could result in a reprimand to the employee.

## **Starting A Nonprofit: What You Need To Know, 1<sup>st</sup> Ed.**

You are not allowed to punch the time clock of another employee. Should your time card be incorrectly punched, for any reason, your supervisor will note the correct start and/or end time, and initial the correction. All time cards must be approved by your supervisor.

For employees required to complete time cards, the cards must be filled out with all hours worked and turned into your supervisor every other Friday as designated by XYZ, by 9:30 A.M. Vacations days, sick days, holidays, and absences such as jury duty, funeral leave or military training, must be specifically noted on the time cards for days on which they occur. Vacation and holidays should be counted as full work days. All time cards must be approved and signed by your supervisor prior to being sent to personnel.

### **Holidays**

XYZ RECOGNIZES THE FOLLOWING HOLIDAYS: NEW YEARS DAY, GOOD FRIDAY, MEMORIAL DAY, INDEPENDENCE DAY, LABOR DAY, THANKSGIVING, CHRISTMAS AND TWO FLOATING HOLIDAYS.

When a holiday falls on a weekend, XYZ will designate the Friday preceding or Monday following as the observed holiday at the discretion of The Organization. Regular full-time employees are paid eight (8) hours for each holiday, regular part-time employees are paid for holidays based upon the number of hours they are normally scheduled. Temporary employees are not paid for holidays, unless they are specifically requested to work on the designated holiday (see Overtime).

The two (2) floating holidays are available to all full-time employees beginning the first of January following the employees first anniversary. Once eligible, the floating holiday are available annually. Floating holidays must be scheduled with, and approved, by your supervisor at least three (3) weeks in advance of the requested date, and may not be taken consecutively. Floating holidays may not be carried forward to be used in the following year.

### **Vacation**

After December 31st, XYZ full-time employees are entitled to one paid day of vacation for each month or partial month of service during the previous year, up to a maximum of 10 working days during the first five (5) years. Part-time employees will receive prorated paid vacation hours based on the regular number of hours worked against an eight (8) hour work day.

Example: If you started work on June 16, 1997, you are entitled to seven (7) vacation days in 1998. Each calendar year succeeding the first year of service, XYZ employees receive ten (10) vacation days per year, earned on a monthly basis. In January following the fifth (5th) year of service, employees receive fifteen (15) vacation days, credited monthly, based on a twelve month calendar. In January, following the tenth (10th) year of service, each employee receives twenty (20) vacation days.

Example: The same employee who started on June 16, 1997, is entitled to ten (10) days in 1999 and twenty (20) days in 2008.



## **Starting A Nonprofit: What You Need To Know, 1<sup>st</sup> Ed.**

Vacation is earned and credited on January 1st of each year, is available for use after March 31st for vacation credited for the current year; and available immediately for vacation carried over from the previous year. Only up to five (5) days of vacation may be carried over into the next year.

A vacation schedule of all employees is to be completed for each department or location, by January 31st of each year, Changes may be made to the schedule with three weeks notice and the approval of the supervisor of the department. The vacation request change must be submitted in writing to the supervisor three weeks prior to the anticipated vacation date.

Every effort will be made by XYZ to accommodate vacation requests, unless business circumstances do not permit. Vacation may be taken in full or half days only.

Employees who resign in good standing and give proper notice of termination, are entitled to receive payment for accrued vacation, not yet taken. If the employee has taken more vacation than actually accrued at the time of resignation, the unearned vacation will be deducted from the employee's final pay check. Employees who terminate with less than 6 months service are not eligible to be paid for accrued vacation.

### **Sick Leave**

XYZ provides payment of income (sick leave) for eligible employees when that employee is away from work due to illness. Employees will be eligible for sick leave after completion of 90 calendar days of service, and if the work at least thirty (30) hours per week. Sick leave is payable the same as the employee's regular salary, and is subject to the same withholding elections. Sick leave will be accrued at the rate of a half (1/2) day for each month of service for eligible employees. The balance of unused, but accrued, sick leave days will be carried forward from one year to the next, up to a maximum of 30 days. All sick leave used by employees will be charged against the employee's total sick leave balance. Employees eligible for retirement from XYZ will be paid for all accrued, but unused, sick leave if the total is greater than 25 days.

Any employee that is out on sick leave longer than two days, must return to work with a doctor's certificate stating the nature of the illness and the employee's fitness to return to duty.

If an employee is unable to work due to illness, the employee must notify his immediate supervisor as soon as possible after the onset of the illness, and certainly by the time the employee was to report to work. It is not permissible to be gainfully employed elsewhere while out on sick leave. Any employee doing so will be considered to have voluntarily quit without notice and to not be in good standing at the time of resignation.

Sick leave may be taken in hourly increments for non-exempt employees, while exempt employees will be charged for sick leave for full day absences only, as exempt employees are not paid for overtime.

XYZ permits use of available sick leave for use during absence due to the birth or adoption of a child to an employee. The sick leave will be in addition to other available time (see Maternity section).

Industrial accidents and illness are covered by Worker's Compensation Insurance pursuant to the requirements of the laws in the various states in which XYZ operates. The sick leave policy outlined above does not apply to those illnesses or injuries that are covered by an applicable worker's compensation policy.

### **Family Medical Leave Act**

XYZ has a Family and Medical Leave Policy that is in compliance with The Family and Medical Leave Act of 1993 (FMLA), which is unpaid leave absence. Eligible employees must be employed by XYZ at least twelve (12) months (but this period need not be consecutive) and have worked at least 1250 hours of service during the twelve month period prior to the request. XYZ locations with less than 50 employees within a seventy-five mile radius is not covered under this leave policy or the FMLA. Forms for leave requests are available from your personnel representative.

Under the Leave Policy a total of up to twelve (12) weeks unpaid leave of absence is available to eligible employees under the following circumstances:

- The birth of a child, but only within the first twelve months of the birth. This may not be used in conjunction with the Maternity Leave policy or the Sick Leave exception policy regarding maternity.
- The placement of a child for adoption or other legal placement, within the first twelve months of the adoption or placement.
- The need to care for a dependent, spouse or parent who has a serious medical condition.
- The serious health condition of the requesting employee, which renders the employee unable to perform the functions of his/her position.
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During the unpaid leave, employees retain the same medical and dental coverage and must still contribute the same amount toward medical benefits as he/she paid before the leave began. (See benefits exception below) Upon return to XYZ at the end of the leave, the employee will be restored to his/her former position with the same rights, benefits, pay and other terms and conditions which existed prior to the leave; or to an equivalent position with equivalent rights, benefits, pay and other terms and conditions of employment.

The Organization reserves the right to deny leave reinstatement to key employees, where such denial is necessary to prevent substantial and grievous economic injury the organization's operations. Key employees will be notified of the organization's intention to deny reinstatement as soon as a determination is made that such injury would occur. In the event such employee decides not to return to work from unpaid leave, he/she will remain on leave for the balance of the leave period and then be terminated. Key employees are defined as the highest- paid ten percent of employees employed by the organization within seventy-five mile radius of the facility where the employee is employed.

Employees will be required to use all accrued vacation and floating holidays prior to being granted unpaid leave as outlined above for the birth or placement of a child, or to care for a seriously ill family member. The birth parent may choose to use the unpaid twelve week leave or to utilize the 6 week paid maternity leave, but cannot use both. If the employee requests the leave due to his/her own serious health condition, the employee may also be eligible for sick leave pay or short term disability payments if the condition of the leave meets the qualifications of those plans.

Employees requesting leave for their own or an eligible family member's serious health condition, will be required to provide medical certification. Medical certification must be provided thirty (30) days in advance of the request for leave when possible.

*XYZ may, at its discretion, require a second medical opinion on the health condition and periodic recertification s at The Organization's expense.*

Other exceptions/provisions:

- When both spouses work for XYZ, their aggregate leave in any twelve- month period may be limited to twelve weeks total, if the leave is taken for the birth or adoption of a child.
- Intermittent or reduced leave may be taken in case of a serious health condition, either an employee's own or that of a child, spouse or parent, when medically necessary. The birth or placement of a child does not qualify for intermittent or reduced leave.
- Employees out on unpaid leave will be required to contact their super- visors, at least every four (4) weeks, to report on their status and intention to return to work at the end of their leave.
- Benefits based on an accrual basis (e.g. vacation, sick leave, floating holidays, etc.) will not accrue during unpaid leave under this policy.
- While on unpaid leave, an employee will not accrue seniority or service time for eligibility for a performance review, salary review, salary review, adjustment or bonus.
- Employment benefits which are accrued prior to the unpaid leave will not be lost.
- As previously stated, group health insurance will continue on the same basis as prior to the leave, as long as the employee continues to pay his/her contribution as required before the unpaid leave.
- An employee on leave for his/her own serious health condition, will be required to provide certification from his/her health care provider that the employee is able to return to work and perform all of the functions of the job to which the employee is returning.

### **Maternity Leave**

XYZ employees are allowed up to six (6) weeks of leave after they have given birth to or following the adoption of a child. During this time, such employees will be paid at 70% of their regular salary. Additional time may be allowed under extraordinary circumstances (see Sick Leave) and with the permission of your supervisor and department head.

### **Funeral Leave**

XYZ allows three (3) days off, with pay, for a death in your immediate family. Immediate family includes parents, spouse, children, brothers, sisters, mother-in-law, father-in-law, grandparents, or grandchildren.

You may request up to an additional two (2) days, which must be approved by your immediate supervisor and the department head. If accrued vacation is available, this benefit will be used for the additional two days; otherwise, the additional two days will be unpaid.

Funeral leave for death of other than immediate family must be approved by your immediate supervisory and the department head. Absence for such a death is limited to two (2) days and will be unpaid.

### **Jury Duty**

We, at XYZ, support employees called to fulfill their civic duty to serve jury duty when called. You must provide your immediate supervisor with a copy of your jury summons as immediately, as possible, upon receiving the summons. Your regular salary will continue as before jury duty for each day served, up to 40 hours per week, for a maximum of four (4) weeks.

Adequate proof of service must be provided in order to receive your regular salary during your absence for jury duty. When you return to work, you should provide your immediate supervisor with verification from the court of the number of days you served on the jury, and the amount that you were paid per day.

If the amount you are compensated by the court, per day, exceeds twenty (\$20) dollars per day, your regular pay will be offset by the excess amount. Extenuating circumstances, which would cause this deduction to become a penalty, must be discussed with and approved by your immediate supervisor. If you are released from jury duty with at least four (4) hours remaining in your work day, you should return to work for the remainder of the day.

Should extraordinary circumstances exist, at the time of your call to jury duty, which would make your absence severely detrimental to the operation of our organization, we reserve the right to contact the court to request that your service be postponed.

### **Military Service**

XYZ proudly grants time off work for employees in the military reserve training program.

After six (6) consecutive months of employment with XYZ, an employee will receive one week's base regular pay for the two week period he/she is away serving reserve duty. You may elect to utilize accrued vacation for the second week you are away at training, if desired. If he/she is employed less than six (6) months, leave will be granted without pay for the time away for reserve duty.

All employees in the military reserve training program should provide a copy of their report orders to their immediate supervisor as immediately as possible.

### **Insurance Benefits**

XYZ Organization (The Organization) makes health insurance, life insurance and accidental death coverage (group benefits) available to eligible employees (see definitions) and their eligible family members. The Organization pays the majority of the premiums for the group benefits, with the employee sharing the balance of the cost. Single and family plans are set at different contribution rates. Long term disability benefits are also offered at no cost to employees.

The low cost of these benefits is an important part of each eligible employee's compensation package. Eligible employees may also purchase optional life insurance for spouses and dependents.

Eligible employees are all full-time employees who have completed ninety (90) calendar days of employment; and part-time employees who work at least twenty-five (25) regular hours a week and have completed ninety (90) calendar days of employment.

Specific details on coverage and benefits are outlined in XYZ's Health Benefit Handbook. It is provided to you during employee orientation. You will also receive authorization forms for all benefits at orientation. Please see your personnel representative if you have not been scheduled for orientation or have not received the Benefit Handbook.

### **Short-term Disability**

Short term disability (STD) benefits provide income continuation during periods of serious illness resulting in total disability. You are "totally disabled" if you are unable to perform your job due to major illness or accidental bodily injury. XYZ employees bear no cost for this plan benefit which provides up to 180 days of short term disability benefits within a twelve-month period.

The employee's total disability period must exceed ten (10) consecutive working days to qualify for STD benefits; and all Sick Leave benefits must be exhausted before an employee can request STD benefits. Once the initial ten (10) day waiting period is met, STD benefits will be retroactive to the first unpaid day of absence (if sick leave benefits are exhausted).

Regular full-time and regular part-time employees of XYZ are eligible for this benefit once they have completed ninety (90) calendar days of service and work at least thirty (30) days per week on a regular basis.

Under STD benefits, eligible employees are paid 80% of their normal base salary. This means the employee will be paid based upon your regular rate of pay excluding overtime, bonus, vacation, and any other accrued paid leave or additional compensation. STD benefits may not exceed 80% of your base salary, unless augmented by available accrued vacation. If additional

payments from worker's compensation or state disability, while you are on STD benefits, increase your overall benefits to exceed 80%, your STD benefits will be reduced accordingly.

Group health benefits will continue on the same basis as prior to the onset of STD benefits. STD benefits will be subject to all payroll withholding elections of the employee which were in effect prior to the short term disability.

It is important that an employee provide their supervisor with the treating doctor's statement as soon as you know an illness or injury will result in an absence greater than ten (10) days. The doctor's statement must identify the nature of your disability and the date you are expected to be able to return to work. XYZ may require a second medical opinion, at its own expense, and periodic recertification s. If there are discrepancies in the first and second opinions, we may require a third doctor to render a medical opinion. This third doctor will be selected jointly by XYZ and the employee, and the third opinion will be binding both on us and the employee.

Upon returning to work, you must provide a release, or return to work form, from the doctor treating your illness or injury.

### **Continuation of Medical/COBRA**

Upon termination from XYZ for any reason other than gross misconduct, an employee may elect to continue group medical coverage at group rates as long as the employee pays the required monthly premium. It is also possible to convert other group plans to individual plans. Details on the conversion of any benefits will be discussed with you at the time of your termination by a personnel representative. You may, of course, request information on this subject at any time prior to actual termination.

### **Worker's Compensation**

Employees who are injured on the job at XYZ are covered by Worker's Compensation Insurance. It is your responsibility to immediately notify your immediate supervisor - or in the absence of your supervisor, the next available supervisor - of any injuries you sustain while on the job at XYZ.

This supervisor will notify your personnel representative. We encourage injured employees to seek immediate medical attention. All medical expenses related to the treatment of an injury, sustained on the job, are paid in full direct to the medical providers. After a specified waiting period, you are also eligible for disability payments set forth by state law, where necessary.

The Worker's Compensation plan is administered by a separate insurance company who will be notified by your personnel representative. You will be contacted by a representative of the administering company. Information on the current company administering this plan will be provided to you by your personnel representative and is available on posters displayed in your work area. Additional information on Worker's Compensation Insurance is available through the Personnel office.

## **Retirement Plans**

XYZ employees have the opportunity to participate in a retirement plan which allows employees to save a portion of their compensation for retirement. After one year of service, employees are eligible to participate in the plan. Contributions to this plan are pre-tax dollars, which means the amount specified by the employee is taken from his/her salary before federal income is taken out. The employee is then taxed on the remaining salary, resulting in additional savings. It should be noted that any distribution from the 401(k) plan will be subject to tax, whether that be early or qualified distribution. Early distribution may also carry a monetary penalty. See your personnel representative for more details and a copy of the XYZ Employee Savings Plan.

Contributions by the organization are based on the amount contributed by the employee, with XYZ matching 30% of the employee's contribution. As with employee contributions, taxes on organization contributions and their related earnings, are deferred until distribution from the plan. Organization contributions are not fully vested to the employee until after a five year period; employee contributions are fully vested from the time of contribution.

Employees are urged to seek advice from a financial expert prior to any distribution from the 401(k) plan. XYZ also contributes to the 401(k) for employees participating in this plan.

## **Tuition Assistance**

It is our belief that education leads to self improvement which improves the value of the employee to XYZ. In that vein, we encourage higher education to prepare employees for greater responsibility within The Organization. XYZ will pay for courses which are directly related to your present job or which will help you prepare for more responsibilities or promotions. All courses must be approved by your supervisor and your personnel representative, who can provide more specific information on courses covered by this plan. Only employees working thirty (30) regular hours or more per week are eligible.

The plan reimburses expenses for any approved course started after your full-time employment with XYZ begins, but reimbursement of expenses will not begin until you have completed six (6) months of full-time employment. Courses and seminars, and related fees, books and materials, directly related to the general and customer service industry are reimbursed to eligible employees at 100%. Tuition for courses taken to complete an approved business degree is also reimbursed at 100%, except that related fees, and costs of books and materials are not covered.

To qualify for reimbursement, the employee must successfully complete the course or seminar with a grade of "C" or better; or where applicable, obtain a completion certificate.

The maximum reimbursement amounts are \$3,000 per year for courses in a degree program, and \$1,500 per year for all other courses or seminars.

Contact your personnel representative for proper request forms. These forms must be completed and reviewed by your supervisor, and the Personnel Director, at least 10 business days prior to your enrollment in any course or seminar.

### **Employee Assistance Program**

We encourage our employees to seek assistance, as needed, from qualified professionals. When personal problems and difficulties are identified and appropriately treated in their early stages, the likelihood of a successful outcome is improved. Our Employee Assistance Program (EAP) helps employees deal with problems in a confidential and safe environment.

Should you require assistance with any problem which is impacting your personal and/or professional life, we encourage you to call.

The confidential number is 1-800-555-5555.

These calls are not monitored and are manned by a privately owned counseling referral service. We, at XYZ, will never be aware of your contact to this service, nor will any reports on your contact or treatment be forwarded to us.

All contact and sessions are strictly confidential. Should visits exceed four (4) times per month consecutively in a three (3) month period, the counselor may refer you to a private therapist or counselor which would be covered under your group benefits.

We cannot stress enough, that if you feel the need for counseling, we strongly encourage that you seek assistance.



## MATERIALS FOR VOLUNTEERS IN YOUR ORGANIZATION

### Example A. Volunteer Protection Act of 1997

#### *Summary: What It Means To You*

1. The purpose of the Volunteer Protection Act of 1997 (VPA) is to provide certain protections to volunteers in lawsuits based on the activities of volunteers. No volunteers shall be liable for harm caused by the act or omission of the volunteer if...
  - A. The volunteer was acting within the scope of their responsibilities;
  - B. The volunteer was properly licensed, certified, or authorized to undertake the activities in question;
  - C. The harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the right or safety of the individual(s) harmed; and
  - D. The harm was not caused by a volunteer operating a vehicle that requires an operator's license or insurance.
2. The VPA prohibits the recovery of punitive damages unless the injured person proves by "clear and convincing evidence" that the volunteer caused the harm by an act constituting willful or criminal misconduct or by conscious, flagrant indifference to the person's safety or rights. This "clear and convincing" standard raises the burden of proof, making it more difficult to recover punitive damages from a volunteer.
3. A volunteer's liability for noneconomic damages will be limited to the proportion of harm for which that volunteer is found liable.
4. The VPA limits the liability of volunteers, but not the liability of the organizations that they serve.
5. The limitation on liability for volunteers does not extend to:
  - A. Crimes of violence or international terrorism for which the volunteer has been convicted by a court;
  - B. Hate crimes;
  - C. Sexual offenses;
  - D. Misconduct that violates State or Federal civil rights laws; or
  - E. Misconduct while under the influence of alcohol or drugs.

## RELEVANT SECTIONS OF ACTUAL LAW

### 42 USC § 14501. Findings and purpose

(a) Findings. The Congress finds and declares that—

(1) the willingness of volunteers to offer their services is deterred by the potential for liability actions against them;

(2) as a result, many nonprofit public and private organizations and governmental entities, including voluntary associations, social service agencies, educational institutions, and other civic programs, have been adversely affected by the withdrawal of volunteers from boards of directors and service in other capacities;

(3) the contribution of these programs to their communities is thereby diminished, resulting in fewer and higher cost programs than would be obtainable if volunteers were participating;

(4) because Federal funds are expended on useful and cost-effective social service programs, many of which are national in scope, depend heavily on volunteer participation, and represent some of the most successful public-private partnerships, protection of volunteerism through clarification and limitation of the personal liability risks assumed by the volunteer in connection with such participation is an appropriate subject for Federal legislation;

(5) services and goods provided by volunteers and nonprofit organizations would often otherwise be provided by private entities that operate in interstate commerce;

(6) due to high liability costs and unwarranted litigation costs, volunteers and nonprofit organizations face higher costs in purchasing insurance, through interstate insurance markets, to cover their activities; and

(7) clarifying and limiting the liability risk assumed by volunteers is an appropriate subject for Federal legislation because—

(A) of the national scope of the problems created by the legitimate fears of volunteers about frivolous, arbitrary, or capricious lawsuits;

(B) the citizens of the United States depend on, and the Federal Government expends funds on, and provides tax exemptions and other consideration to, numerous social programs that depend on the services of volunteers;

(C) it is in the interest of the Federal Government to encourage the continued operation of volunteer service organizations and contributions of volunteers because the Federal Government lacks the capacity to carry out all of the services provided by such organizations and volunteers; and

(D)(i) liability reform for volunteers, will promote the free flow of goods and services, lessen burdens on interstate commerce and uphold constitutionally protected

due process rights; and (ii) therefore, liability reform is an appropriate use of the powers contained in article 1, section 8, clause 3 of the United States Constitution, and the fourteenth amendment to the United States Constitution.

(b) Purpose. The purpose of this Act is to promote the interests of social service program beneficiaries and taxpayers and to sustain the availability of programs, nonprofit organizations, and governmental entities that depend on volunteer contributions by reforming the laws to provide certain protections from liability abuses related to volunteers serving nonprofit organizations and governmental entities.

#### **42 USC § 14502. Preemption and election of State nonapplicability**

(a) Preemption. This Act preempts the laws of any State to the extent that such laws are inconsistent with this Act, except that this Act shall not preempt any State law that provides additional protection from liability relating to volunteers or to any category of volunteers in the performance of services for a nonprofit organization or governmental entity.

(b) Election of State regarding nonapplicability. This Act shall not apply to any civil action in a State court against a volunteer in which all parties are citizens of the State if such State enacts a statute in accordance with State requirements for enacting legislation—

- (1) citing the authority of this subsection;
- (2) declaring the election of such State that this Act shall not apply, as of a date certain, to such civil action in the State; and
- (3) containing no other provisions.

#### **42 USC § 14503. Limitation on liability for volunteers**

(a) Liability protection for volunteers. Except as provided in subsections (b) and (d), no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if—

- (1) the volunteer was acting within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity at the time of the act or omission;
- (2) if appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity;
- (3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; and

(4) the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to:

- (A) possess an operator's license; or
- (B) maintain insurance.

(b) Concerning responsibility of volunteers to organizations and entities. Nothing in this section shall be construed to affect any civil action brought by any nonprofit organization or any governmental entity against any volunteer of such organization or entity.

(c) No effect on liability of organization or entity. Nothing in this section shall be construed to affect the liability of any nonprofit organization or governmental entity with respect to harm caused to any person.

(d) Exceptions to volunteer liability protection. If the laws of a State limit volunteer liability subject to one or more of the following conditions, such conditions shall not be construed as inconsistent with this section:

(1) A State law that requires a nonprofit organization or governmental entity to adhere to risk management procedures, including mandatory training of volunteers.

(2) A State law that makes the organization or entity liable for the acts or omissions of its volunteers to the same extent as an employer is liable for the acts or omissions of its employees.

(3) A State law that makes a limitation of liability inapplicable if the civil action was brought by an officer of a State or local government pursuant to State or local law.

(4) A State law that makes a limitation of liability applicable only if the nonprofit organization or governmental entity provides a financially secure source of recovery for individuals who suffer harm as a result of actions taken by a volunteer on behalf of the organization or entity. A financially secure source of recovery may be an insurance policy within specified limits, comparable coverage from a risk pooling mechanism, equivalent assets, or alternative arrangements that satisfy the State that the organization or entity will be able to pay for losses up to a specified amount. Separate standards for different types of liability exposure may be specified.

(e) Limitation on punitive damages based on the actions of volunteers.

(1) General rule. Punitive damages may not be awarded against a volunteer in an action brought for harm based on the action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization or governmental entity unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.

(2) Construction. Paragraph (1) does not create a cause of action for punitive damages and does not preempt or supersede any Federal or State law to the extent that such law would further limit the award of punitive damages.

(f) Exceptions to limitations on liability.

(1) In general. The limitations on the liability of a volunteer under this Act shall not apply to any misconduct that—

(A) constitutes a crime of violence (as that term is defined in section 16 of title 18, United States Code) or act of international terrorism (as that term is defined in section 2331 of title 18) for which the defendant has been convicted in any court;

(B) constitutes a hate crime (as that term is used in the Hate Crime Statistics Act;

(C) involves a sexual offense, as defined by applicable State law, for which the defendant has been convicted in any court;

(D) involves misconduct for which the defendant has been found to have violated a Federal or State civil rights law; or

(E) where the defendant was under the influence (as determined pursuant to applicable State law) of intoxicating alcohol or any drug at the time of the misconduct.

(2) Rule of construction. Nothing in this subsection shall be construed to effect subsection (a)(3) or (e).

#### **42 USC § 14504. Liability for non-economic loss**

(a) General rule. In any civil action against a volunteer, based on an action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization or governmental entity, the liability of the volunteer for noneconomic loss shall be determined in accordance with subsection (b).

(b) Amount of liability.

(1) In general. Each defendant who is a volunteer, shall be liable only for the amount of noneconomic loss allocated to that defendant in direct proportion to the percentage of responsibility of that defendant (determined in accordance with paragraph (2)) for the harm to the claimant with respect to which that defendant is liable. The court shall render a separate judgment against each defendant in an amount determined pursuant to the preceding sentence.

(2) Percentage of responsibility. For purposes of determining the amount of noneconomic loss allocated to a defendant who is a volunteer under this section, the trier of fact shall determine the percentage of responsibility of that defendant for the claimant's harm.

## **42 USC § 14505. Definitions**

For purposes of this Act:

(1) Economic loss. The term "economic loss" means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.

(2) Harm. The term "harm" includes physical, nonphysical, economic, and noneconomic losses.

(3) Noneconomic losses. The term "noneconomic losses" means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation and all other nonpecuniary losses of any kind or nature.

(4) Nonprofit organization. The term "nonprofit organization" means—

(A) any organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act; or

(B) any not-for-profit organization which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act.

(5) State. The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, any other territory or possession of the United States, or any political subdivision of any such State, territory, or possession.

(6) Volunteer. The term "volunteer" means an individual performing services for a nonprofit organization or a governmental entity who does not receive—

(A) compensation (other than reasonable reimbursement or allowance for expenses actually incurred); or

(B) any other thing of value in lieu of compensation, in excess of \$ 500 per year, and such term includes a volunteer serving as a director, officer, trustee, or direct service volunteer.

### Volunteer Position Description and Sample Worksheet

Consider using or adapting this worksheet to develop position descriptions for the volunteer positions in your nonprofit.

#### *Sections of the Explanation and Example Job Description*

**Purpose:** This section describes the specific purpose of the position in no more than two sentences. If possible, the purpose should be stated in relation to the nonprofit's mission and goals.

*Example:* The position of Patient Counselor supports XYZ Organization's Patient Advocacy program for cancer patients. The counseling program is designed to help cancer patients by providing support services such as applying for Medicare, Medicaid and Social Security Disability benefits; locating community resources; and managing debt and negotiating with creditors

**Job Title:** What title has been assigned to the position?

*Example:* XYZ Volunteer Patient Counselor

**Location:** Where will the volunteer work?

*Example:* The Patient Advocacy Program is conducted at the offices of XYZ Organization on Main Street in Roanoke, Virginia.

**Key Responsibilities:** List the position's major duties.

*Example:* The XYZ Volunteer Patient Counselor offers advice and assistance to help cancer patients:

- understand the intricacies of health insurance coverage
- apply for public benefits
- appeal denials of insurance and disability benefits
- protect their jobs
- locate community resources
- arrange for the care and custody of children
- forestall debt collection efforts
- plan for the future by drafting wills, powers of attorney and medical directives

**Reports to:** Indicate the title of the person to whom the volunteer reports.

*Example:* Executive Director of XYZ Organization

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**Length of Appointment:** Note the time period in which the volunteer will serve, and include restrictions, if applicable.

*Example:* The XYZ Patient Counselor will serve for Fall 2005 and Spring 2006. The volunteer is eligible to further serve with approval from the Executive Director.

**Time Commitment:** Indicate the approximate number of days or hours required per week.

*Example:* The XYZ Volunteer Patient Counselor position requires a minimum commitment of two hours per week. In addition, each volunteer must attend a six-hour orientation during the week before participation begins. The orientation program is held from 3-9 p.m. each Wednesday.

**Qualifications:** List education, experience, knowledge, and skills required. If a criminal history record check or other background check will be conducted, it should be indicated here.

*Example:* Eligible candidates for the Patient Counselor position include adults over 21 years of age who have earned a Bachelor's Degree and Juris Doctor Degree, who pass a criminal history record check and other screening procedures, and who are currently members in good standing of the Virginia State Bar.

**Support Provided:** List resources that will be available to the volunteer.

*Example:* Training for this position will be provided at the six-hour orientation session. In addition, the Executive Director is available on an ongoing basis to answer questions and provide other assistance as needed.

*Other categories that an organization would include, if applicable, in a volunteer job description are:*

- *appointed by*
- *development opportunities*
- *relationships*
- *age requirement*
- *benefits provided (e.g., lunch, T-shirt or opportunity to assist a young person achieve academic success).*



## BASIC VOLUNTEER APPLICATION

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Application Date \_\_\_\_\_

Volunteer Position Sought \_\_\_\_\_

Name \_\_\_\_\_

Home Address \_\_\_\_\_

Work Phone \_\_\_\_\_ Home Phone \_\_\_\_\_

### Education

Highest Level of Education \_\_\_\_\_

### Employment

Current Employer, if applicable \_\_\_\_\_

Position/Title \_\_\_\_\_

Dates of Employment (starting, ending) \_\_\_\_\_

Company/Employer \_\_\_\_\_

Address \_\_\_\_\_

Would you like us to keep your employer abreast of your volunteer service and achievement?

No\_\_ Yes\_\_

Special training, skills, hobbies \_\_\_\_\_

\_\_\_\_\_

Groups, clubs, organizational memberships \_\_\_\_\_

\_\_\_\_\_

Please describe your prior volunteer experience (include organization names and dates of service) \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

What experiences have you had that may prepare you to work as a volunteer in the field of cancer patient advocacy, or a related field? \_\_\_\_\_

\_\_\_\_\_

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Why do you want to volunteer? What do you want to gain from this volunteer experience?

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Have you ever been convicted of a crime? If yes, please explain the nature of the crime and the date of the conviction and disposition. Conviction of a crime is not an automatic disqualification for volunteer work.

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Do you have: a driver's license? No\_\_ Yes\_\_  
Car insurance? No\_\_ Yes\_\_  
Car available for transporting others? No\_\_ Yes\_\_  
Malpractice insurance, if applicable? No\_\_ Yes\_\_

REFERENCES: Please list three people who know you well and can attest to your character, skills, and dependability. Include your current or last employer.

| Name/Organization | Relationship to You | Phone | Length of relationship |
|-------------------|---------------------|-------|------------------------|
| 1. _____          |                     |       |                        |
| 2. _____          |                     |       |                        |
| 3. _____          |                     |       |                        |

***Please read the following carefully before signing this application:***

*I understand that this is an application for and not a commitment or promise of volunteer opportunity.*

*I certify that I have and will provide information throughout the selection process, including on this application for a volunteer position and in interviews with XYZ Organization that is true, correct and complete to the best of my knowledge. I certify that I have and will answer all questions to the best of my ability and that I have not and will not withhold any information that would unfavorably affect my application for a volunteer position. I understand that information contained on my application will be verified by XYZ Organization. I understand that misrepresentations or omissions may be cause for my immediate rejection as an applicant for a volunteer position with XYZ Organization or my termination as a volunteer.*

Signature \_\_\_\_\_ Date \_\_\_\_\_

## Disclaimer Language for a Volunteer Application\*

*\*Please note that the disclaimer language featured below is not appropriate for all volunteer assignments. Low-risk volunteer positions should probably not be subject to the rigorous review and scrutiny contemplated in this disclaimer. Before using disclaimer language, give some thought to how it will be perceived by prospective volunteers and modify to meet the specific needs of your nonprofit.*

### Read Carefully Before Signing This Application

I hereby consent to permit XYZ Organization to contact anyone it deems appropriate to investigate or verify any information provided by me to discuss my suitability for a volunteer position, including my background, volunteer experience, education or related matters. I expressly give my consent to any discussions regarding the foregoing and I voluntarily and knowingly waive all rights to bring an action for defamation, invasion of privacy, or similar cause of action, against anyone providing such information.

I hereby authorize any organization affiliated with XYZ Organization to investigate my background as necessary for the consideration of my application for the position of \_\_\_\_\_

I further authorize all persons, schools, companies, organizations, credit bureaus and law enforcement agencies to supply all information concerning my background and to furnish reports thereon. I hereby release them and any organization affiliated with XYZ Organization from any and all liability and responsibility arising from their doing so.

I certify that the answers given by me to all questions on this application and any attachments are, to the best of my knowledge and belief, true and correct and that I have not knowingly withheld any pertinent facts or circumstances. I understand that any omission or misrepresentation of fact in this application may result in refusal of or separation from volunteer service upon discovery thereof.

I understand that this is an application for and not a commitment or promise of volunteer opportunity.

Applicant's Signature \_\_\_\_\_ Date \_\_\_\_\_

## **QUESTIONS TO ASK A REFERENCE FOR A VOLUNTEER POSITION**

### **General questions**

- In what capacity have you known the applicant and for how long?
- Would you rehire the applicant? If no, why not?
- How does the candidate handle frustration and criticism while on the job?
- Was the candidate punctual?

### **Questions for applicants who will be working with children, the elderly, the disabled or other vulnerable clients**

- When and where have you observed the candidate working with young children or the elderly?
- What is the candidate's philosophy about discipline?
- In your opinion, are there any reasons why placing vulnerable clients in the care of the candidate would expose the clients to undue risk or harm?

### **Question for applicants for mentoring positions**

- Would you be comfortable having the applicant assigned to mentor someone in your family?

## CHAPTER 5 APPENDIX: OPERATIONS AND GOVERNANCE DOCUMENTS

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### *Sample Conflict of Interest Statement* 132

For Officers, Directors, Committee Members, Staff Members, Institute Faculty and certain Consultants to the Legal Information Network for Cancer (LINC).

No member of the LINC Board of Directors, or any of its Committees, shall derive any personal profit or gain, directly or indirectly, by reason of his or her participation with LINC. Each individual shall disclose to LINC any personal interest which he or she may have in any matter pending before LINC and shall refrain from participation in any decision on such matter.

Any member of the LINC Board, any Committee or Staff who is an officer, board member, a committee member or staff member of a borrower organization or a loan applicant agency shall identify his or her affiliation with such agency or agencies; further, in connection with any credit policy committee or board action specifically directed to that agency, he/she shall not participate in the decision affecting that agency and the decision must be made and/or ratified by the full board.

Any member of the LINC Board, any Committee, Staff of Institute Faculty shall refrain from obtaining any list of NFC clients for personal or private solicitation purposes at any time during the term of their affiliation.

At this time, I am a Board member, a committee member, or an employee of the following organizations:

| NAME | CONTACT INFORMATION |
|------|---------------------|
| 1.   |                     |
| 2.   |                     |
| 3.   |                     |
| 4.   |                     |
| 5.   |                     |

Now this is to certify that I, except as described below, am not now nor at any time during the past year have been:

- 1) A participant, directly or indirectly, in any arrangement, agreement, investment, or other activity with any vendor, supplier, or other party; doing business with LINC which has resulted or could result in person benefit to me.
- 2) A recipient, directly or indirectly, of any salary payments or loans or gifts of any kind or any free service or discounts or other fees from or on behalf of any person or organization engaged in any transaction with LINC.

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<sup>132</sup> Adapted from Internet Nonprofit Center sample policy, available at <http://www.nonprofits.org/npofaq/16/59.html>, accessed on April 17, 2005.

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Any exceptions to 1 or 2 above are stated below with a full description of the transactions and of the interest, whether direct or indirect, which I have (or have had during the past year) in the persons or organizations having transactions with LINC.

| TRANSACTION | DESCRIPTION |
|-------------|-------------|
| 1.          |             |
| 2.          |             |
| 3.          |             |
| 4.          |             |
| 5.          |             |

Date: \_\_\_\_\_

Signature: \_\_\_\_\_

Printed name: \_\_\_\_\_

Legal Information Network for Cancer (LINC)  
Roanoke Valley Regional Office  
Roanoke, Virginia

## CHAPTER 5 APPENDIX: AVOIDING CONFLICTS

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### *Sample Conflict of Interest Policy 133*

A conflict of interest is defined as an actual or perceived interest by a (staff member/board member/network attorney) in an action that results in or has the appearance of resulting in, personal, organizational or professional gain. A conflict of interest occurs when a (staff member/board member/network attorney) has a direct or fiduciary interest which include:

- Ownership with; or
- Employment of or by; or
- Contractual relationship with; or
- Creditor or debtor to; or
- Consultative or consumer relationship to:

a member of the Board of Directors/Trustees or an employee where one or the other has supervisory authority over the other or with a client who receives services. (In other organizations the definition of conflict of interest includes any bias or the appearance of bias in a decision-making process that would reflect a dual role played by a member of the organization or group. An example, for instance, involves a person who is an employee and a Board member, or a person who is an employee and who hires family members as consultants.)

It is in the interest of the organization, individual staff and Board members to strengthen trust and confidence in each other, to expedite resolution of problems, to mitigate the effect and to minimize organizational and individual stress that can be caused by a conflict of interest.

Employees are to avoid any conflict of interest and even the appearance of a conflict of interest. This organization serves the Roanoke community as a whole rather than only serving a special interest group. The appearance of a conflict of interest can cause embarrassment to the organization and jeopardize the credibility of the organization. Any conflict of interest, potential conflict of interest or the appearance of a conflict of interest is to be reported to the Executive Director or your supervisor immediately. Employees are to maintain independence and objectivity with clients, the community and organization. Employees are called to maintain a sense of fairness, civility, ethics and personal integrity even though law, regulation or custom does not require them.

Employees, members of employee's immediate family, and members of the Board are prohibited from accepting gifts, money or gratuities from the following:

- Persons receiving benefits or services from the organization;
- Any person or entity performing or seeking to perform services under contract with the organization; and

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<sup>133</sup> Donald A. Griesmann, *What Must We, What Can We Disclose to the Public, Staff, Board and Clients?*, Aug. 10, 2002, updated Jul. 14, 2003), available at <http://www.nonprofits.org/npofaq/misc/020120dag.html>, accessed on April 17, 2004.

**Starting A Nonprofit: What You Need To Know, 1<sup>st</sup> Ed.**

- Persons who are otherwise in a position to benefit from the actions of any employee of the organization.

Employees may, with the prior written approval of the Executive Director, receive honoraria for lectures and other such activities while on personal days, compensatory time, annual leave or leave without pay. If the employee is acting in any official capacity, honoraria received by an employee in connection with activities relating to employment with the organization are to be paid to the organization.



*Sample Lawyer-Client Conflicts Screening Form*

Upon contact from a potential LINC client, please note the following information during the initial telephone screening interview. This information should then be sent via email or interoffice mail to the staff attorneys at LINC for review and consideration. Any potential conflicts of interest should be recorded on this form and filed appropriately with all other initial screening forms. The email can include this form and a simple statement such as:

“Please let me know if there is any reason why we may not undertake the representation of Jane Doe, a cancer patient from Roanoke Valley who has never been previously represented by an attorney. Her relevant information is attached. A conflict exists if:

- Representation will be directly adverse to another client; or
- There is a significant risk that the representation of this client will be materially limited by representation of another client, a former client, or a third person, or the personal interest of the lawyer; and
- You do not reasonably believe that you can provide diligent and competent representation to each conflict without violating the law or other Rules of Professional Responsibility, and you receive written, informed consent from each affected client.”<sup>134</sup>

If a network attorney is contacted regarding this client’s case, he/she should review this information to ensure that no present conflict exists. In the event that a conflict does exist, that attorney shall be appropriately screened from all information and discussion related to this case.

|                                       |  |
|---------------------------------------|--|
| <b>Name</b>                           |  |
| <b>Address</b>                        |  |
| <b>Phone</b>                          |  |
| <b>Email</b>                          |  |
| <b>Previous Legal Representations</b> |  |
| <b>Current Legal Issue</b>            |  |
| <b>Temporary File No.</b>             |  |
| <b>Conflicts</b>                      |  |

Recorded By:

\_\_\_\_\_  
Signed

\_\_\_\_\_  
Date

\_\_\_\_\_  
Printed Name

<sup>134</sup> ABA Model Rule 1.7.

**SAMPLE FEE AGREEMENT** (*ordinary*)

THIS AGREEMENT, made and entered into this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between \_\_\_\_\_, hereinafter referred to as Attorney, and \_\_\_\_\_, hereinafter referred to as Client provides as follows:

1. Attorney shall represent Client on the following matter: \_\_\_\_\_
2. Client shall pay Attorney a fee of \_\_\_\_\_ Dollars, which shall be paid as follows: \_\_\_\_\_
3. Client shall further reimburse to Attorney all costs and expenses as they become due. These may include, but are not limited to, court reporter fees, investigator's fees, expert witness fees, costs of testing, photographic services, travel expenses, exhibit preparations, and copying costs.
4. Legal fees [*shall/shall not*] include representation or services for any appeal or retrial.
5. Client shall fully co-operate with attorney and truthfully disclose all facts about this case.
6. In the event Attorney must withdraw or cannot continue in the representation of Client, Attorney shall refund the unearned portion of any legal fees paid. Attorney shall be entitled to keep fees for services rendered up to the time of termination at a rate of \_\_\_\_\_ Dollars per hour.
8. Client states that he/she has read this Agreement and has had all his/her questions about it answered and fully understands and agrees to it.
9. Witness the following signatures and seals.

\_\_\_\_\_  
Attorney

Date: \_\_\_\_\_

\_\_\_\_\_  
Client

Date: \_\_\_\_\_

**SAMPLE FEE AGREEMENT**  
(when organization is paying attorney)

THIS AGREEMENT, made and entered into this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between \_\_\_\_\_, hereinafter referred to as Attorney, and *Legal Information Network for Cancer (LINC)*, hereinafter referred to as Organization, and \_\_\_\_\_, hereinafter referred to as Client provides as follows:

1. Attorney shall represent Client on the following matter: *preparing a last will and testament.*
2. Organization shall pay Attorney a fee of \_\_\_\_\_ Dollars, which shall be paid as follows: *in one payment upon completion of services.*
3. Organization shall further reimburse to Attorney all costs and expenses as they become due. These may include, but are not limited to, court reporter fees, investigator's fees, expert witness fees, costs of testing, photographic services, travel expenses, exhibit preparations, and copying costs.
4. Legal fees [*shall/shall not*] include representation or services for any appeal or retrial.
5. Attorney shall ensure that Organization will not interfere with Attorney's professional independence or seek to compromise Client's confidential information.
6. Client shall fully co-operate with attorney and truthfully disclose all facts about this case.
7. In the event Attorney must withdraw or cannot continue in the representation of Client, Attorney shall refund the unearned portion of any legal fees paid to Organization. Attorney shall be entitled to keep fees for services rendered up to the time of termination at a rate of \_\_\_\_\_ Dollars per hour.
8. Client states that he/she has read this Agreement and has had all his/her questions about it answered and fully understands and agrees to it.

Witness the following signatures and seals.

\_\_\_\_\_  
Attorney

Date: \_\_\_\_\_

\_\_\_\_\_  
Client

Date: \_\_\_\_\_

\_\_\_\_\_  
Organization

Date: \_\_\_\_\_

**SAMPLE CONSENT TO FUTURE CONFLICTS**

I, the undersigned client, do hereby retain and employ the law firm of \_\_\_\_\_ as my attorneys to represent me in my claim against *ABC Insurance Company*, “Defendant,” arising out of *Defendant’s denial to cover the medical costs of my breast augmentation that I received on the \_\_\_ day of \_\_\_\_\_, 2005, following a mastectomy, which was needed to remove a cancerous lump.*

I hereby consent to future conflicts *involving the law firm’s possible representation of ABC Insurance Company as a defendant in a different matter with a different plaintiff. (Note: The reason must be specific and Client must fully understand the potential conflict. See Comment 22 to ABA Rule 1.7.)*

Following consideration of the aforesaid future conflict, I hereby state that I consent and agree to my representation by the law firm of \_\_\_\_\_.

Given under my hand and seal this \_\_\_ day of \_\_\_\_\_, 2005.

\_\_\_\_\_(SEAL)  
Client

The above employment is accepted upon the terms stated herein.

Law Firm

By: \_\_\_\_\_(SEAL)

**CONSENT TO DISCLOSURE OF INTAKE INTERVIEW INFORMATION**

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I understand that the following information is protected by the ABA Model Rules and cannot be released without written consent unless otherwise provided for in the rules. I also understand that I may revoke this consent in writing at any time unless action has already been taken upon this consent. I further understand that by consenting to this disclosure the organization collecting this information owes no duty of loyalty to me, so that no future conflict of interest can result so long as the organization does not represent me.

I hereby consent to disclosure of the following information related to my request for legal representation for the purposes of determining whether I qualify for representation by the organization within its set priorities and limitations and for determining whether a conflict of interest exists with an attorney within the organization.

*[The organization's questions would follow which would probably include the person's name, income, basic problem, etc.]*

\_\_\_\_\_  
Client

Date: \_\_\_\_\_

**RETAINER AGREEMENT LIMITING REPRESENTATION**

THIS AGREEMENT, made and entered into this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between \_\_\_\_\_, hereinafter referred to as Attorney, and \_\_\_\_\_, hereinafter referred to as Client,

WITNESSETH:

THAT FOR AND IN CONSIDERATION of the mutual covenants contained herein, the parties hereby agree as follows:

1. Attorney will represent Client in certain legal matters as counsel, to-wit: *warrant in debt brought by MCV Physicians*. It is understood that this Agreement does not include representation on appeal, retrial or for any other purpose except those expressly stated herein.

2. Client understands that Attorney cannot effectively represent Client without the cooperation and total honesty of Client, and accordingly, Client agrees to be open, cooperative and honest with Attorney in all matters.

4. Client acknowledges being fully advised on the availability of and information about other counsel, including court-appointed counsel where appropriate, and after due consideration, Client desires to have Attorney represent him as his counsel, and therefore enters into this Agreement.

5. Witness the following signatures and seals:

\_\_\_\_\_) SEAL)  
Client

\_\_\_\_\_) SEAL)  
Attorney

**VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY  
RULES ADDRESSING CONFIDENTIALITY**

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In Virginia the issue of confidentiality is addressed in three separate provisions found in the Virginia Code of Professional Responsibility. They read as such :

*3-104 (C) Nonlawyer Personnel.*

A lawyer or law firm that employs nonlawyer personnel shall exercise a high standard of care to assure compliance by the nonlawyer personnel with the applicable provisions of the Code of Professional Responsibility. The initial and the continuing relationship with the client must be the responsibility of the employing attorney.

*4-101 Preservation of Confidences and Secrets of a Client.*

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except as provided by DR 4-101(C) and (D), a lawyer shall not knowingly:

- (1) Reveal a confidence or secret of his client.
- (2) Use a confidence or secret of his client to the disadvantage of the client.
- (3) Use a confidence or secret of his client for the advantage of himself or a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

- (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
- (2) Confidences or secrets when required by law or court order.
- (3) Information which clearly establishes that his client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation.
- (4) Confidences or secrets necessary to establish the reasonableness of his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall reveal:

- (1) The intention of his client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall,

where feasible, advise his client of the possible legal consequences of his action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel.

(2) Information which clearly establishes that his client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that his client advise the tribunal of the fraud. Information is clearly established when the client acknowledges to the attorney that he has perpetrated a fraud upon a tribunal.

(E) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

*5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.*

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) A lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure.

(E) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.



## EXAMPLE OF NPO SPECIFIC CONFIDENTIALITY POLICY

LINC maintains a strict policy on the use of client identification and related information. We value your privacy and know how important it is to you to have complete peace of mind regarding our use of information about you. We have always used personal information ONLY when necessary to fulfill requests made by you. We restrict access to our facilities and records in order to assure the security of client information. We NEVER exchange, sell or otherwise provide other organizations with client information. We will continue to work hard to protect client information so that you can sleep easier knowing we care about you and your privacy.

Confidentiality is the cornerstone of all LINC programs. All client records are clearly marked confidential and are secured at all times. A client must sign a completed disclosure form prior to the release of any information. Client confidentiality will only be breached when a client is in eminent danger of hurting themselves or others.

## EXAMPLE OF NPO SPECIFIC CONFIDENTIALITY AND NONDISCLOSURE AGREEMENT FOR BOARD MEMBERS AND EMPLOYEES

LINC maintains strict confidentiality and security of records in compliance with the Health Insurance Portability and Accountability Act (HIPAA), in addition to other federal and state laws. These laws pertain to the security and privacy of all records that contain information that identifies or could lead to the identification of a client or that could reveal private information concerning an employee or client.

Employees are authorized access to such private information as a condition of employment to the extent necessary to perform their duties. As an employee/volunteer/board member/third-party administrator of LINC, you are required to protect against unauthorized access to such information, ensure the security and privacy of such information, and disclose any anticipated threats or hazards to such information. You must be very careful not to release this information to the public or to other individuals, including but not limited to employees who have not been authorized or who do not have a **legitimate business need to know**. Any questions regarding release of such information to another person should be directed to your supervisor or their designee.

LINC defines unauthorized access to be:

1. Access to client, employee or organizational information not necessary to carry out your job responsibilities.
2. Non-business access to the records of clients or employees. This includes employee and client children, spouse, parents and other relatives as well as friends and acquaintances.
3. Release of client or employee information to unauthorized internal or external users.
4. Release of additional or excessive client or employee information to an authorized individual/agency than is essential to meeting the stated purpose of an approved request.

Information may not be divulged, copied, released, sold, loaned, reviewed, altered or destroyed except as properly authorized by the appropriate organization official within the scope of applicable federal or state laws, including record retention schedules and corresponding Internal Governing Policies.

As an employee/volunteer/board member/third-party administrator of LINC, you must abide by the rules, regulations, policies and procedures of LINC as well as federal and state laws applicable to your position in this organization. LINC may at any time revoke employee/volunteer/board member/third-party access, other authorization or other access to confidential information. Additionally, failure to comply with any of the acts, rules, regulations, LINC policies and corresponding procedures may result in disciplinary action, including termination of employment. Criminal or civil penalties may also be imposed, depending upon the nature and severity of the breach of confidentiality.

Having read and understood this policy

**AGREED AND ACCEPTED BY:**

Date: \_\_\_\_\_

By \_\_\_\_\_ Witness: \_\_\_\_\_

Title: \_\_\_\_\_

**EXAMPLE OF NPO SPECIFIC CONFIDENTIALITY AND NONDISCLOSURE AGREEMENT FOR CLIENT**

**CONFIDENTIALITY AND NONDISCLOSURE AGREEMENT**

**WHEREAS,** \_\_\_\_\_ [YOUR NAME] agrees to furnish certain confidential information relating to [insert what type of information may be collected];

**WHEREAS,** \_\_\_\_\_ [NPO NAME] agrees to review, examine, inspect or obtain such confidential information only for the purposes described above, and to otherwise hold such information confidential pursuant to the terms of this Agreement.

**BE IT KNOWN,** that \_\_\_\_\_ [YOUR NAME] has or shall furnish to \_\_\_\_\_ [NPO NAME] certain confidential information and may further allow \_\_\_\_\_ [NPO NAME] the right to discuss or share this information on the following conditions:

1. \_\_\_\_\_ [NPO NAME] agrees to hold confidential or proprietary information in trust and confidence and agrees that it shall be used only for the contemplated purposes, shall not be used for any other purpose, or disclosed to any third party unless expressly authorized by this agreement or further written authorization by \_\_\_\_\_ [YOUR NAME].
2. At the conclusion of any discussions, or upon demand by \_\_\_\_\_ [YOUR NAME], all confidential information shall be returned to \_\_\_\_\_ [YOUR NAME].
3. Confidential information shall not be disclosed to any employee, consultant or third party unless they agree to execute and be bound by the terms of this Agreement, and have been approved by \_\_\_\_\_ [YOUR NAME].
4. This Agreement and its validity, construction and effect shall be governed by the laws of [insert jurisdiction].

**AGREED AND ACCEPTED BY:**

Date: \_\_\_\_\_

By \_\_\_\_\_

Witness: \_\_\_\_\_

Title: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

**ABA MODEL RULES OF PROFESSIONAL CONDUCT  
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**RULE 1.0 TERMINOLOGY**

- (a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.
- (b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.
- (c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.
- (d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.
- (e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.
- (f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.
- (g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.
- (h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.
- (i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
- (j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.
- (k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

### **Confirmed in Writing**

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

### **Firm**

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

## **Fraud**

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

## **Informed Consent**

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

## **Screened**

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

### **RULE 1.6 CONFIDENTIALITY OF INFORMATION**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the



lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

#### Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

## **Authorized Disclosure**

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

## **Disclosure Adverse to Client**

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has

committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for

disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

### **Acting Competently to Preserve Confidentiality**

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

### **Former Client**

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

## **RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Comment

### **General Principles**

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse

a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [[29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

### **Identifying Conflicts of Interest: Directly Adverse**

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

### **Identifying Conflicts of Interest: Material Limitation**

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

### **Lawyer's Responsibilities to Former Clients and Other Third Persons**

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

### **Personal Interest Conflicts**

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

### **Interest of Person Paying for a Lawyer's Service**

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

### **Prohibited Representations**

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).



## **Informed Consent**

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

## **Consent Confirmed in Writing**

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

## **Revoking Consent**

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

## **Consent to Future Conflict**

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

## **Conflicts in Litigation**

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed

consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

### **Nonlitigation Conflicts**

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

### **Special Considerations in Common Representation**

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot

be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

## Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

### **RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES**

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer

any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

- (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
- (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
- (2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Comment

### **Business Transactions Between Client and Lawyer**

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and

participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

### **Use of Information Related to Representation**

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

### **Gifts to Lawyers**

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the



client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

### **Literary Rights**

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

### **Financial Assistance**

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

### **Person Paying for a Lawyer's Services**

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality.

Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

### **Aggregate Settlements**

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

### **Limiting Liability and Settling Malpractice Claims**

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition,

the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

### **Acquiring Proprietary Interest in Litigation**

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

### **Client-Lawyer Sexual Relationships**

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

### **Imputation of Prohibitions**

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

## **RULE 1.13 ORGANIZATION AS CLIENT**

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

#### Comment

#### **The Entity as the Client**

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As

defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

### **Relation to Other Rules**

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d)

may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

### **Government Agency**

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

### **Clarifying the Lawyer's Role**

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

### **Dual Representation**

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

### **Derivative Actions**

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.



## RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee there from; and

(ii) written notice is promptly given to the prospective client.

### Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule

1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

## **RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
- (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
- (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
- (4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

- (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
- (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
- (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

### Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

**RULE 7.2: ADVERTISING**

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

- (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
- (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;
- (3) pay for a law practice in accordance with Rule 1.17; and
- (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

- (i) the reciprocal referral agreement is not exclusive, and
- (ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

**Comment**

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the

public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

### **Paying Others to Recommend a Lawyer**

[5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service.)

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and

lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.