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General Counsel for Nonprofits: What the Board Should Expect From Standing Counsel

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IN BRIEF

- Standing counsel to a nonprofit should serve the organization itself, not the executive director and not any individual director, and a board should hear that said plainly at the first meeting.
- New York's Not-for-Profit Corporation Law requires the board to adopt and oversee a conflict of interest policy with set minimum contents, annual written statements from every director, and extra steps when an insider has a substantial financial interest in a deal with a charity.
- Counsel should keep a compliance calendar that carries the federal Form 990 filing, the New York annual financial report with its accountant review and audit tiers, and the governance tasks that have no government deadline at all.

The board meets on Thursday. The treasurer has a question about a new grant, a director's cousin has offered the organization a discount on office space, and nobody is quite sure whether last year's financial report went in on time. None of these is a crisis. Each is the kind of question a nonprofit's standing counsel should already have an answer to, or at least know exactly where to find one.

For a nonprofit, ongoing counsel is a governance job before it is a contracts job. A company's lawyer is judged mostly by the paper that crosses the desk. A nonprofit's counsel is judged by whether the board can show, at any moment, that it governed: that conflicts were disclosed and handled, that filings were made, that money given for a particular purpose was spent on that purpose, and that the minutes say what happened. Contracts matter too. They are just not the main thing a board should judge counsel on.

Who is the client?

The first thing a board should expect is a clear answer to a question most nonprofits never ask out loud. Our answer, and the one a board should insist on seeing in the engagement letter whoever it retains, is that the client is the organization. Not the executive director who made the introduction, not the board chair who signed the letter, and not any individual director. Counsel who cannot say that plainly at the first meeting will struggle to say it at the meeting where it matters, when the organization's interests and one person's interests pull apart.

What belongs on the calendar

Standing counsel should keep a compliance calendar and walk the board through it once a year, rather than rebuild it during an emergency. The anchors:

- **The annual IRS return.** Most tax-exempt organizations must file an annual return or notice from the Form 990 series; churches and certain church-related and other organizations are among the exceptions. An organization that is required to file and does not do so for three consecutive years loses its federal tax exemption automatically. The IRS calls this automatic revocation, and getting the exemption back is a process, not a phone call.

- **The New York annual financial report.** Executive Law section 172-b applies to charities registered, or required to be registered, with the Attorney General under section 172 of that law. A charity with gross revenue and support of at least $250,000 but not more than $1 million in a fiscal year must file its annual financial report with a financial statement that includes an independent accountant's **review** report. Above $1 million, the statement must include an independent accountant's **audit** report, a deeper and costlier examination. The report is due on or before the fifteenth day of the fifth calendar month after the fiscal year ends.
- **Charitable registration and renewals**, plus registration in any other state where the organization asks for donations, coordinated with counsel admitted there where another state's law controls.
- **The governance items with no government deadline**: the annual conflict statements, a rotating review of policies, executive pay reviewed and documented before a contract renews rather than after, and a reconciliation of gifts that came with restrictions.

The conflict policy is not a formality

New York is specific here, and it is where boards most often believe they are covered because a document exists. Section 715-a of the Not-for-Profit Corporation Law requires the board to adopt a conflict of interest policy and to oversee how it is carried out and followed. The statute sets the minimum contents. The policy must:

1. Define the circumstances that count as a conflict of interest.
2. Set procedures for disclosing a conflict, or a possible one, to the board or a committee, and for deciding whether a conflict exists.
3. Require the person with the conflict to stay out of the deliberation and the vote, while allowing the board to ask them for background information or answers beforehand.
4. Prohibit any attempt by that person to influence the deliberation or vote improperly.
5. Require that the conflict and how it was resolved be recorded in the organization's records, including the minutes.
6. Set procedures for related party transactions, meaning deals between the organization and an insider or their family or businesses, under section 715.

The policy must also require every director, before first being elected and every year after, to sign a written statement listing the entities they are connected with that have a relationship with the organization, and any transaction in which they might have a conflicting interest.

Section 715 adds more for one kind of deal. For a charitable corporation, where a related party has a substantial financial interest in a transaction, the board or an authorized committee must consider alternatives before entering into it, approve it by at least a majority of those present, and record in writing, at the time, the basis for approving it, including the alternatives it considered.

Read that list against your own practice. Many boards have a policy that covers the first two items, collect the annual statements into a folder nobody opens, and keep minutes that record the vote but not who stepped out. The fifth item is the one that gets tested, because it is the one that leaves a record.

What the board should expect in the minutes

Minutes are the organization's memory and, in a dispute, its evidence. Standing counsel should draft or review them, and they should show:

- Who was present, and who left the room for which item.
- That a conflict was disclosed, by whom, and how it was resolved.
- The comparison data the board looked at before an executive pay decision, and that the interested person was not in the room for it.
- The restriction attached to any significant gift accepted.
- Approvals stated as approvals, with the text of the resolution, rather than as a story of the discussion.

Minutes written the following week are minutes. Minutes rebuilt at year-end are a reconstruction, and they read like one.

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An illustration

This is a composite, not a client. A youth arts organization had $940,000 in revenue last fiscal year and budgets $1.15 million for this one, thanks to a new multi-year grant. The board treats this as a fundraising success, which it is. It is also a legal event on more than one calendar.

If the year's gross revenue and support actually passes $1 million, the organization moves from the review tier into the audit tier for its New York financial report: a different engagement, a different cost and a different lead time. An audit engagement letter signed in the eleventh month of the fiscal year is a scramble. Signed in the second month, it is a line in the budget. Counsel's job is not to perform the audit. It is to say, in the meeting where the grant is celebrated, that this year ends with a different filing, when it is due, and that the finance committee should engage the accountant early.

The same growth can trigger a second rule. Section 715-b generally requires a whistleblower policy, protecting people who report suspected wrongdoing from retaliation, once an organization has twenty or more employees and more than $1 million in annual revenue in the prior fiscal year. If the new grant also means new hires, counsel should have that policy ready before the year it becomes required.

Then there is the grant itself. A restricted multi-year grant creates obligations that outlast the celebration: the restriction has to be tracked, reported on and reconciled, and the organization should be able to show at any point that restricted money was not spent as general revenue.

What standing counsel should say is outside the engagement

A board should also hear, early, what the relationship does not include. On the firm's plans, ongoing counsel covers governance, compliance, contracts, disputes handled at the negotiating table and strategic advice. Litigation is never part of a plan. It goes, along with real estate transactions, tax, and matters governed by another state's law, to counsel we choose and oversee, and we stay involved.

One transaction deserves special mention because it surprises boards. Selling, leasing, exchanging or otherwise disposing of all or substantially all of a charitable corporation's assets needs more than a board vote. Section 510 of the Not-for-Profit Corporation Law says such a transaction "shall in addition require approval of the attorney general or the supreme court." Section 511-a lets the organization ask the Attorney General instead of going to court, unless it is insolvent (or the deal would make it so) or the Attorney General decides a court should review it. A board that hears these boundaries early will not be surprised by them during a crisis.

Where to start

At your next board meeting, ask the secretary for the signed conflict statements from every director for this year. If any are missing, or if the folder has never been opened, that is your first agenda item. While you are at it, ask when your New York financial report is due and which tier your revenue puts you in.

This is general information about New York nonprofit governance, not legal advice about your organization. Thresholds and filing rules change; check the current requirements before relying on them.

WRITTEN BY

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Anthony is the Managing Partner of Clemenza Law Group and serves as general counsel to a wide range of companies and philanthropic organizations. Nearly every essay here began as a real question from a real client: the contract that landed at 4 p.m., the board that meets on Thursday. He writes them the way he would answer you across the table, plainly and with care.

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