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### Top Ten Things a New Nonprofit General Counsel Should Investigate

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The honeymoon phase does not last long for a new general counsel (GC)—on day one of your new job, you are going to start learning about all those things that could not be disclosed during the courting phase, whether out of concern for protecting the attorney-client privilege or out of concern for not scaring you away. Still, there will usually be a period of time when you first start when you can identify issues and make changes with support from management. Given that brief window of time, where should a new GC start? The top ten list below is based on discussions with a few of my nonprofit general counsel friends, as well as my experience working as outside counsel for organizations that recently hired new in-house counsel. While not comprehensive, it hits the important points to consider in your first weeks and months on the job.

#### Litigation.

Let's start with the obvious one—a new GC should immediately familiarize himself/herself with all active litigation in which the organization is a party or otherwise closely involved (e.g., as a recipient of a third-party subpoena). Nonprofit organizations can be complex and far-flung entities, so do not assume that the files you inherit from the old GC will have all the necessary information. Many nonprofits that engage in advocacy, for example, may file amicus briefs regularly and it is not unheard of for the public policy department rather than legal to guide those activities. Also, larger nonprofits with sophisticated human resources departments may keep information on EEOC or state agency employment filings in human resources. The important point here is that you need to be aware of pending deadlines, budgets, and organizational exposures as quickly as possible.

#### Tax Filings.

Many in-house counsel to nonprofit organizations come to their positions without much background on tax-exemption issues. If that is the case, you'll need to become a quick study and familiarize yourself with the basic tenets of tax exemption and what your organization needs to do (or not do) in order to lessen risk to its exempt status. Virtually every piece of advice a nonprofit GC will give to his/her client will need to take into account the effects on exempt status. Study those recent Forms 990 (beyond the key employee compensation section, which you may have already studied during the interviewing phase) and become familiar with what the organization is telling the IRS and the public about its operations. Take a close look at the tax-exemption application form for your organization (assuming it is on file)—is the organization still doing what it said it would do on its application? If not, how is it different? While you are at it, take a close look at recent audited financials and management letters and see if the files mention anything about potential FIN48 issues that could give rise to significant UBIT exposure or exempt status risk.

Consider having a meeting early on in your tenure with the individual responsible for getting the Form 990 completed and filed for your organization. An early, frank discussion about areas of concern should help immensely as you prioritize. Finally, review the files to determine if the IRS ever audited your organization and, if so, what the results were. The IRS will often close an audit with no change, but may include some "advisories" about corrections that the organization should make to its operations going forward. Of course, those advisories are part of the IRS's record on the organization and will certainly be referred to by the IRS if a subsequent examination is conducted.

#### Document Retention Procedures.

While ultimately you will want to review all significant organizational policies (see item 8 below), this

one bears a special mention. Are the organization's policies for handling and routinely destroying documents (paper and otherwise) adequate? Equally important, are the policies being followed properly? Are there any litigation holds currently in place? If not, should there be? If so, is it time that they can be lifted? While a poor document retention policy or implementation cannot change overnight, starting the process of improving organizational document control should be a priority for any new GC in order to lessen organizational legal risks in the future.

### **Recent Employment Actions.**

Take a close look at the nonprofit's employment history, particularly as it pertains to recent adverse employment actions. That close look should include a review of demographic information, compensation information, supervisor-specific turnover data, and severance payment history. This review will give you a good idea of how likely employment-related litigation or agency action is in the near term and will help you assess whether there are significant deficiencies in the organization's employment practices and policies. Further, the GC should consult with the organization's human resource professionals to determine whether there are currently employees on probation or likely to be terminated—it may be an opportunity to lessen legal exposure.

### **Governance Documents.**

A new GC should take a close look at the organization's articles of incorporation and bylaws early on in his/her tenure. This is not to suggest a comprehensive governance review/revision; rather, this is a time to read the documents closely and understand how the board is structured, how frequently it should meet, what rights the members (if any) have, etc. While obvious anomalies should be identified and addressed at this point—are there more board members than are authorized by the documents? Is there inconsistency between the bylaws and the articles?—keep in mind that most nonprofit organizations have routine governance review procedures with involvement by members of the board and other volunteers.

One important tip when it comes to the articles of incorporation review—do not rely on the copy of the articles that may be in the files you inherited; instead, make the small expenditure of obtaining a copy of the articles that is on file with the state of incorporation. Often an organization's files may not have all amendments. Further, obtaining the articles from the state of incorporation will also give you an opportunity to confirm that the organization is in good standing. Do not be surprised if the organization is not in good graces with the state due to failure to file an annual report or some other ministerial omission.

And while you're looking into the organization's corporate standing, it also will be a good time to determine whether other state filings are up to date—charitable solicitation registration and reporting, state property or other tax exemptions, corporate status for affiliates, etc.

### **Leases and Other Contracts.**

Familiarize yourself with the major contracts where the organization is a party. Of course, at or near the top of that hit parade will be the office space and other leases the organization has entered into. Is there a renewal date coming up or an opportunity to cancel or amend? More broadly, new in-house counsel should pay attention to the overall contract management procedures and review processes that the organization employs to determine whether they are adequate. If they are inadequate, establishing such a system is a key priority. Far too often, nonprofit organizations find themselves stuck in transactions with unfavorable terms for a long time simply because of a failure to provide prompt notice of intent not to renew or otherwise take advantage of a one-time "out" opportunity in the deal.

### **Lobbying and Political Filings.**

This one will only apply to some nonprofit organizations, but for those it is very important. Organizations that may be active in legislative or political matters are subject to an array of complex state and federal registration and reporting requirements. While the legal exposure for failures to file promptly or correctly are generally relatively low for first-time offenders, the public relations impact can often be devastating, as your political opponents will no doubt jump on any reports of noncompliance. Further, a failure to properly abide by applicable tax rules for lobbying expenditures could give rise to significant liabilities. Check with the organization's chief public policy official and get an understanding for what types of reporting are being done and how the reports are managed. From a longer term perspective, you may want to hone those procedures—it is often the case that a nonprofit organization's lobbying department may not be using an effective recordkeeping or time-tracking

process.

### **Policy Review.**

When one considers that the first few months on the job for a new nonprofit GC is akin to a triage operation, it may seem as though a review of the organization's policies (such as the employee handbook or the governance procedures) is a luxury that can wait until later. Not so fast—those policies come often up in litigation and IRS audit contexts, particularly if they are insufficient or not followed. Similar to the governance document review, consider a stepwise approach here. First, look at the policies with an eye toward familiarizing yourself with how the organization operates—Who maintains the conflict of interest disclosure forms? How long is the organization's probationary period for new employees?—and identifying glaring problems or omissions. Then, consider scheduling a more detailed policy review and revision for some time later in your tenure.

### **Internal Controls.**

When you have your discussion with the chief financial officer to talk about the Form 990 and other exempt status issues, ask for a review of all internal control policies—issues like check signing authority, procedurals for handling payments, and bank account access. Look into what contractors in this area have warranted and what they have disclaimed.

### **Insurance.**

Finally, take a look at all of the organization's insurance coverages. Many larger nonprofit organizations may have risk management professionals, either on staff or contractors, who will be able to provide insight into the intended scopes of the coverages as well as some history on why the organization opted for the policies it has. Of course, be certain to give proper notices to the organization's applicable carrier in the event of litigation or some other event. As part of your review of the coverages, be certain to look at the applicable applications that the organization completed—the disclosures made in those applications will usually form the basis for the scope of coverage granted. For example, an organization that may have recently begun significant publishing activities that it had not previously engaged in could be underinsured on that front if this activity was not disclosed in the applicable application. Consider engaging experienced insurance counsel to get an expert's take on the organization's insurance coverages.

Of course, the above "top ten" really only scratches the surface. Depending on your organization, there are any number of other areas of concern that will need your prompt attention—antitrust risks, copyright and trademark issues, and employee benefit matters, for example. Also, there may be pressure for you to devote much of your initial time to a major matter which may make it tempting for you to set aside the above review until things settle down. Of course, it is likely that things may never settle down entirely, so it is important to cover as many of the items above as promptly as you can and not get caught up solely in one particular issue when you first arrive—doing so will pay dividends later, both for you and for your client.

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For more information on nonprofit organizations and political activities, contact the author at 202-344-4790 or [geconstantine@Venable.com](mailto:geconstantine@Venable.com).

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