



Issues of Confidentiality and Ethics to Consider in Nonprofit Organizations

For the Missouri Institute of Mental Health

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For more information about the NPML Program: www.umsl.edu/npml

The University of Missouri St. Louis Nonprofit Management & Leadership Program (“NPML Program”) fills a vital need for nonprofit education and training in the St. Louis metropolitan region, and beyond. In so doing, the NPML Program offers comprehensive education and training for individuals looking to develop the skills and knowledge necessary to be a vital and instrumental part of the nonprofit community. In addition, the NPML Program also offers consulting and program development and/or management services to help nonprofits expand their capacity and further their missions.

Agenda Overview:

- Introduction and welcome
- Confidentiality
- Ethics

Course Content:

I. Introduction and welcome

- a. Information about the NPML and MPPA programs at UMSL
- b. My background

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II. Confidentiality

- a. I know the title of this presentation is “Issues of Confidentiality...”, but for nonprofits, transparency and confidentiality are flip sides of the same coin.
 - i. To learn more about issues of confidentiality, we first need to understand requirements and expectations for transparency in and by nonprofit organizations.
- b. Let’s start with the “authority” I’m using for today’s presentation
 - i. “Broad strokes” of the laws and regulations that apply to nonprofit corporations, with tax exempt status:
 1. KEY is to think of the two (most likely) sets of oversight, laws, and regulations that apply to your organization: (a) your nonprofit corporation form, and (b) your tax exempt status (HOW MANY IN THE AUDIENCE KNOW their organizational form and tax exempt status??):
 - a. Nonprofit Corporation (State law – State attorney general and/or secretary of state)
 - i. In Missouri: The Missouri Nonprofit Corporation Act is at Chapter 355 of the Missouri Revised Statutes, starting at 355.001, and proceeding through 355.881
 1. See:
<http://www.moga.mo.gov/mostatutes/ChaptersIndex/chaptIndex355.html>
 2. Within the Missouri Nonprofit corporate statute – note the records/info you have to keep, and the info/records you do not have to share:
 - a. See:
<http://revisor.mo.gov/main/OneSection.aspx>

[on.aspx?section=355.821&bid=19304&hl=](http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2280&ChapAct=805%26nbsp%3BILCS%26nbsp%3B105%2F&ChapterID=65&ChapterName=BUSINESS+ORGANIZATIONS&ActName=General+Not+For+Profit+Corporation+Act+of+1986%2E)

ii. In Illinois, General Not for Profit Corporation Act of 1986 can be found at 805 ILCS 105 of the Illinois Compiled Statutes
<http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2280&ChapAct=805%26nbsp%3BILCS%26nbsp%3B105%2F&ChapterID=65&ChapterName=BUSINESS+ORGANIZATIONS&ActName=General+Not+For+Profit+Corporation+Act+of+1986%2E>

iii. These are the laws that will GOVERN and CONTROL the formation and operation of the nonprofit if they are organized under these provisions

1. So, in other words, a Missouri Chapter 355 nonprofit corporation is governed by...

b. Tax Exempt Organization (IRS)

i. With respect to your tax exempt status, the IRS the key: <http://www.irs.gov/charities/index.html>

ii. IRS information on proper operation of a 501(c)(3) public charity = Compliance Guide for 501(c)(3) Public Charities (which is probably what you are) at: <http://www.irs.gov/pub/irs-pdf/p4221pc.pdf>

iii. For purposes of today's presentation, with respect to transparency issues of tax-exempt organizations, we are particularly concerned with the IRS Form 990. (**Note: not every organization has to file the full 990, but that's the form we are focusing on today**)

1. See: <https://www.irs.gov/pub/irs-pdf/f990.pdf>

2. The IRS requires annual reporting, and the best tool the federal government has to determine if your organization and board are living up to the duties and responsibilities of a tax exempt organization on a continuing

basis is the IRS Form 990 Annual Information Return.

3. **(almost) ALL** 501(c)(3) organizations must file some version of the 990
 - a. There are various forms, depending on the size of your organization: Form 990, Form 990-EZ, or Form 990-PF along with Schedules A and B. Beginning in 2008, even the smallest tax exempt organizations had to start submitting an annual electronic notice using Form 990N, *Electronic Notice (e-Postcard) for Tax-Exempt Organizations not Required To File Form 990 or 990-EZ*, also known as the e-Postcard.
 - b. There are some exceptions to this filing requirement. For example, “churches” (note that specific definition – vs. “religious organizations”, for example) are NOT required to file some form of the 990. See, page 22 of the IRS publication for Churches and Religions Organizations, for example: <http://www.irs.gov/pub/irs-pdf/p1828.pdf>
4. The 990 was revised in 2008, and it now requires tax exempt 501(c)(3) organizations to report on their various governance practices.
5. We won't review the entire form here, but, in sum it's not just about \$ (although that is a BIG part of the info needed on the form 990), it's about the way you operate, govern and manage your organization and its assets.
6. It is a tool the IRS uses to make sure you are meeting all the requirements that allow you to maintain your tax exempt status

7. For example, Part VI of the 990 looks at your governance, management and **disclosure** policies and practices:
 - a. <http://www.irs.gov/pub/irs-pdf/f990.pdf>
 - b. “Part VI: Governance, Management & Disclosure” Note especially “Section B” in Part VI: “Policies” – i.e. written conflict of interest policy.
8. See also Part VII: Compensation of Officers, Directors, Trustees, etc.
 - a. Note: with respect to transparency/confidentiality you have to “list the organization’s five current highest compensated employees (other than an officer, director, trustee, or key employee) who received reportable compensation (Box 5 of Form W-2 and/or Box 7 of Form 1099-MISC) of more than \$100,000 from the organization and any related organizations.”
 - b. But also note you are not listing the compensation of others outside this definition – so some salary information isn’t “public information”
2. Another guide to “good governance” and oversight, even beyond laws and regulations = the Better Business Bureau Charity Information Service charity seal program:
<http://www.bbb.org/stlouis/charities-donors/>
 - a. Note the 20 standards/criteria that must be met for a charity to get this seal: <http://www.bbb.org/stlouis/charities-donors2/standards-for-charity-accountability/>
 - i. **#5:** No transaction(s) in which any board or staff members have material conflicting interests with the charity resulting from any relationship or business affiliation. (ethics)

- ii. Standards 11 through 13 – financial reporting (transparency)
 - iii. Standards 15 through 19 – fundraising reporting (transparency, privacy)
 - 1. Also speaks to accurate, truthful, ethical reporting...
 - b. This can be your blueprint or road map for good governance and oversight policies, activities, etc. There may also be a fundraising benefit if you can show donors that you've achieved the BBB's charity seal...
- 3. Presentation materials used by Assistant Attorney General Bob Carlson in my class at UMSL each semester – see his power point slides:
 - a. Of particular note for our discussion today: slides #9 and #10 – top ten list of ways to get investigated
 - i. Point #2: Conflicts of Interest (ethics)
 - ii. Point #5: Failing to operate with the necessary transparency (confidentiality vs. transparency)
 - iii. Points #7 and #8 too – failing to file what you should with the government, and violating fundraising laws (both speak to transparency/confidentiality and ethics)
 - iv. Note the public thinks it should be able to get A LOT of information about nonprofits – see slide 25, and following slides.
 - v. Also note, board members should pretty much be able to see everything. Maybe not protected client info, etc., but almost everything...
 - 1. If you are a board member, and you can't get information – BIG RED FLAG
- 4. Missouri Secretary of State – and annual filings for Missouri Nonprofit Corporations:
 - a. See: <https://www.sos.mo.gov/business/corporations>

- i. There isn't a whole lot of information in your nonprofit corporation annual report/filing, but still promotes a certain level of transparency...
- 5. Missouri Sunshine law: <https://www.ago.mo.gov/docs/default-source/publications/missourisunshinelaw.pdf?sfvrsn=4>
 - a. Really applies to Missouri "Public Governmental Bodies". (See definitions on page 6 of the PDF.)
 - b. But note 610.010(f): "quasi-public governmental body" – this is going to apply to some Chapter 355 nonprofit corporations that have 501(c)(3) tax-exempt status...
 - c. See Bob Carlson slide #28
 - d. Example of how some other states might consider open meeting laws to apply to nonprofit organizations: https://nonprofitquarterly.org/2018/01/05/nonprofits-take-note-open-meetings-disclosure-laws-may-apply/?utm_source=cerkl&utm_medium=email&utm_campaign=newsletter-01062018&cerkl_id=1173239&cerkl_ue=Mn7cTFcHgay1%2F7m%2FIQzh%2Fn2pwQ3B3G5Oy9IP6tCa52s%3D
- c. Beyond the filings and standards – other things to consider in the struggle between transparency and confidentiality in nonprofit organizations
 - i. Donor info – guard it jealously
 - 1. Note the limited donation/financial information you have to reveal in the 990
 - a. Many donors want to remain anonymous – that's one place you want to be very conscious about maintaining confidentiality. Do not reveal donor info unless you "have to" provide it.
 - b. This is an important place to think about **cybersecurity**
 - ii. Client information – guard it jealously. Important place to maintain confidentiality.
 - iii. Board meetings – some parts open, some "closed session"
 - iv. Personnel info below level of ED/CEO

1. But should nonprofits be willing to share compensation info for all positions?
 2. Other employment matters – i.e. termination decisions and information
- v. Health info
- vi. Other?
1. Trade secrets?
 2. Proprietary info?
- vii. To boil it down...
1. Transparency is important for nonprofits, and is generally expected. But when in doubt, it's ok to be cautious and err on the side of confidentiality IF you have good reason to do so...
 - a. Probably be especially careful with (1) health info, (2) termination decisions, (3) donor information, (4) client information, (5) legal matters/lawsuits, and (6) some employment/compensation information

III. Ethics

- a. Industry specific codes of ethics
 - i. Association of Fundraising Professionals:
<http://www.afpnet.org/Ethics/content.cfm?ItemNumber=3093&navItemNumber=536>
 - ii. National Association of Social Workers:
https://www.socialworkers.org/LinkClick.aspx?fileticket=ms_ArtLqzeI%3d&portalid=0
 - iii. National Board for Certified Counselors:
<http://www.nbcc.org/Ethics/CodeOfEthics>
 - iv. American Institute of Certified Public Accountants:
<https://www.aicpa.org/interestareas/professionaethics.html>
- b. Conflicts of interest
 - i. Duty of Loyalty

1. The duty of loyalty is a standard of faithfulness; a board member must give undivided allegiance when making decisions affecting the organization. This means that a board member can never use information obtained as a member for personal gain, but must act in the best interests of the organization.
2. How do you meet this duty?
 - a. Perhaps most important vehicle or safeguard for satisfying the duty of loyalty is a good conflict-of-interest policy. A conflict-of-interest policy helps safeguard against organizational conflicts of interest, and should be included in the bylaws for your nonprofit corporation.
 - b. Do you remember where concerns about conflicts of interest fell on the list of concerns for the Attorney General's office?
 - c. A conflict of interest occurs when a director has a material, financial, or personal interest in the impending transaction with the corporation.
 - i. When the personal or professional concerns of a board member or a staff member affect his or her ability to put the welfare of the organization before personal benefit, conflict of interest exists. Nonprofit board members are likely to be affiliated with many organizations in their communities, both on a professional and a personal basis, so it is not unusual for actual or potential conflict of interest to arise.
 - ii. MO law about how to handle conflicts of interest for directors of nonprofit corporations:
<http://www.moga.mo.gov/mostatutes/stathtml/35500004161.html>
 1. NOTE that transactions that present or involve a conflict of interest CAN BE approved...
 2. Note that conflicts can be approved or waived before they occur– key is for full disclosure, no harm to the nonprofit, and full and detailed consideration and review of possible conflict by the board.

3. But should you...?? The more you do it, the more you look like you are letting a private person benefit at the cost of, or because of, the nonprofit, tax exempt organization...and the IRS, among others, cares about that...

4. But what if... “she’s giving us a great deal?”

3. Why must we be concerned about conflict of interest?

- a. Board service in the nonprofit sector carries important ethical obligations. Nonprofits serve the broad public good, and when board members fail to exercise reasonable care in their oversight of the organization they are not living up to their public trust. In addition, board members have a legal responsibility to assure the prudent management of an organization's resources. In fact, they may be held liable for the organization's actions. A 1974 court decision known as the "Sibley Hospital case" set a precedent by confirming that board members can be held legally liable for conflict of interest because it constitutes a breach of their fiduciary responsibility.
- b. Nonprofit organizations rely on community support and must be wary of creating the impression that money or resources received from the general public are somehow profiting board members.
- c. To maintain federal tax exempt status as a 501(c)(3) corporation, a nonprofit must avoid private inurement, private benefit, and self-dealing. There cannot be any indication that a board member or staff member is somehow siphoning off part of a charity's income or assets for personal use.
- d. Does conflict of interest involve only financial accountability?
 - i. No. Conflict of interest relates broadly to ethical behavior, which includes not just legal issues but considerations in every aspect of governance.
- e. What can we do to prevent conflict-of-interest situations?
 - i. From www.boardsource.org: Self monitoring is the best preventative measure. Institute a system of

checks and balances to circumvent actual or potential conflict of interest, beginning with well defined operating policies on all matters that might lead to conflict. Most important, create a carefully written conflict-of-interest policy based on the needs and circumstances of the organization. Ask each board and staff member to agree in writing to uphold the policy. A conflict of interest policy should be reviewed regularly as part of board self assessment.

4. What should be included in a conflict-of-interest policy? A policy on conflict of interest has three essential elements:
 - a. Let's engage in a **hypothetical** situation as part of this – I'm on the board, and my wife owns an IT services company...
 - b. Full disclosure
 - i. Board members and staff members in decision-making roles should make known their connections with groups doing business with the organization. This information should be provided at least annually. Further, on an ongoing basis, directors and staff members should disclose to the board any personal or financial interest they have that might be impacted by a potential board action.
 1. From www.boardsource.org: Use of a disclosure form: An essential part of a strong conflict-of-interest policy is a disclosure form. This is a document that every board member should fill out annually, listing all of his or her professional, financial, and personal affiliations that might affect his or her independent decision-making capacity during board service. This document serves as a guide to determine conflict of interest when specific issues are handled by the board. The chair should regularly review the documents.
 - c. Board member abstention from discussion and voting.

- i. Board members who have an actual or potential conflict of interest should not participate in discussions or vote on matters affecting transactions between the organization and the other group. To be safe, the director should probably leave the room during board meetings any time discussion revolves around a potential conflict so the other board members can discuss the issues freely.
 1. Also, staff members who have an actual or potential conflict also should not be substantively involved in decision-making affecting such transactions.
- d. The directors approving the transaction in good faith reasonably believe and find that the transaction is in the best interest of the agency
- e. IRS has a recommended conflict of interest policy: As Appendix A of the instructions form for the 1023 (see page 25 of that document): <http://www.irs.gov/pub/irs-pdf/i1023.pdf>
- c. Ethical Fundraising: <https://www.councilofnonprofits.org/tools-resources/ethical-fundraising>
 - i. Great overview information at this council of nonprofits web site/link – note the “headings” in this web page/link.
 1. One point I want to note in particular: “Can we pay our fundraiser a commission?”
 - a. It is not appropriate for a nonprofit to compensate a fundraising professional based on a percentage of the money raised.
 - ii. More specific gift/donation solicitation, acceptance, acknowledgement policies – see AFP standards (link above)

IV. Questions?

NOTES: