

Why Nonprofits Need Lawyers

by Allen R. Bromberger

Introduction

Our country, since its inception, has relied on private charitable or nonprofit organizations to provide essential services to people in need. Either on their own or in partnership with government agencies, these organizations offer health care, education, housing, food and myriad other, often vital, services. Government's continuing policy of withdrawal from providing these social programs, coupled with the economic downturn and the concomitant rise in unemployment, puts nonprofit executives in the unenviable position of trying to meet escalating demand for their services with dwindling resources.

There is no question: the landscape is challenging. Most nonprofits must tighten their belts and comply with increased regulatory requirements and more stringent oversight on the part of regulators, while demonstrating to their funders continued adherence to the highest ethical standards. Fortunately, nonprofits are usually founded and led by passionate, civic-minded individuals – people who see a need and take the initiative to meet it. Creative and enterprising, these individuals are helping their communities every day. But they can't do it alone. Just as business people in the for-profit sector rely on a cadre of trained professionals to keep them moving toward their goals, managers of nonprofits also need help navigating the rocky fiscal and legal shoals of an increasingly complex environment.

Though most nonprofits don't realize it, that help is available: an army of top-tier transactional attorneys stands ready to help nonprofits fulfill their missions. They are there not simply to bail nonprofits out of trouble should it arise, but to help keep them running smoothly while anticipating and avoiding trouble spots. This pool of legal

talent has grown enormously in the wake of September 11, and qualified organizations can avail themselves of these critical services at little or no cost.

The Chicago Community Loan Fund, for example, has worked with the Community Economic Law Project, part of the Lawyers Committee for Civil Rights in Chicago, headed by attorney Susan Kaplan, to close over seventy-five real estate deals. "We use legal services for almost everything," says Calvin Holmes, Executive Director of the Loan Fund. "Any time we think we need legal advice we reach out to Susan's group, and usually within a very quick time they link us up with pro bono counsel. They have given us first-rate service and responsiveness, as if we were billable clients."

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Like Holmes's organization, most small and mid-size nonprofits can and should avail themselves of pro bono relationships with law firms or individual attorneys for help with everything from getting set up to strategic planning, in addition to expert handling of the essential transactions on which their very viability depends: governance, by-laws, adherence to state and federal law and regulation, up-to-code human resource policy, leases, even effectively managing the IRS.

An Ounce of Prevention: Nonprofits Need Legal Expertise

There may have been a time when most nonprofits operated below the radar of government regulators and could get by without expert legal help. “Nonprofits always thought they could do their own leases, contracts, and hiring-and-firing. Maybe once they could,” says Marion Fremont-Smith, a Senior Research Fellow at the Hauser Center for Nonprofit Organizations at Harvard University and one of the country’s first charities regulators. According to Fremont-Smith, this is no longer the case. The shift started in the medical sector, when hospitals realized they had to negotiate their own rate setting procedures. “That’s what woke them up,” remarks Fremont-Smith.

Now hospitals, museums, and other goliaths of the nonprofit world operate with half-billion dollar budgets and invariably have both in-house counsel and established relationships with outside firms, says Peter Swords, former President of the Nonprofit Coordinating Committee of New York. However, he notes that about 80% of nonprofits account for only 20% of the sector’s revenues. These small and medium-sized nonprofits – the backbone of the sector – have little built into their budgets for anything other than their programs, and they tend to be less knowledgeable than their moneyed peers about the ways transactional attorneys can support them. But regardless of size, every nonprofit must adhere to the federal and state laws that govern them.

“If I were a for-profit company,” says Guy E. Lescault, ABC Project Director in Atlanta for the Georgia Legal Services Program, “I would have my in-house counsel doing my legal checkup so that I’m not going to be sued, or have any worries about the IRS, or be concerned about anyone coming in with employment challenges. Most nonprofits don’t understand that until it’s too late.”

Indeed, the political pressure is on the IRS to monitor nonprofit returns just as closely as it does for-profit businesses. Joel Fleishman, Director of the Sanford Center for Public Policy at Duke University and a senior consultant to The Atlantic Philanthropies, points out that, according to the IRS, a majority of nonprofits’ Form 990s are either incomplete or full of errors.

“While few organizations set out to be negligent, sometimes nonprofits might assume that no one is going to notice if they overlook some regulations,” observes Richard Allen, former head of the Division of Public Charities at the Massachusetts Attorney General’s office and now an attorney in private practice. “But that’s dicey,” warns Allen. “Around the country I’m noticing that government regulators are being pretty aggressive about protecting these interests.”

It’s not just malfeasance that leads to violations. Ignorance and neglect can land well-meaning nonprofits in a lot of hot water. Pamela Mann, a former head of the Charities Bureau at the New York Attorney General’s office who now has her own practice specializing in nonprofits, tells of a small foundation caught giving loans to its directors, a per se violation of the law. “They just didn’t know it was wrong,” says Mann. “They never consulted legal counsel and wound up with a major problem on their hands when the State Attorney General’s office got wind of the deals.”

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The trouble is, nonprofits with annual budgets of between \$100,000 and \$5 million tend to approach legal counsel on two occasions. The first is when they are just opening their doors and need help incorporating and getting their 501(c) status. The second is when they find themselves in a crisis.

“Getting it right in the beginning – before there’s an actual problem – is so important,” says Daniel Grunfeld, President and CEO of Public Counsel, a nonprofit that provides pro bono legal help to nonprofits. “Because,” he adds, “when things do go wrong, the resources necessary to fix them take a dramatic toll, not just in terms of money but in hours devoted by the board, the executive director and staff.”

The Executive Director of The Center for Contemplative Mind in Society, Rene Theberge, says, “The world is too complicated. It’s too easy, innocently and naively and in good faith, to make a mistake that causes a lot of harm to a lot of people.” Theberge adds, “Every nonprofit should have a good lawyer, someone they can rely on. Those people managing nonprofit agencies are so busy staying on top of things and fulfilling their mission, they can’t possibly keep up with all the stuff that’s out there.” There really is no choice for well-managed nonprofits. They have a responsibility both to those they serve and those from whom they solicit money. Their duty is to conduct themselves not only in accordance with all laws and regulations, but in a manner that best allows them to fulfill their mission. In this regard, lawyers can be a real asset.

Governance

Nonprofits need to be set up properly and to manage their day-to-day operations in accordance with their corporate by-laws and internal guidelines, as well as with applicable laws and regulations. Sound legal advice can ensure that a nonprofit is correctly established and that the board of directors and staff know their organization is in compliance.

“Governance is a huge issue,” agrees Lauren Goldstein, Executive Director of Cause Effective, a New York City-based nonprofit that helps develop resources for other nonprofits. “Boards don’t always understand that they have legal responsibilities, that this isn’t just a nice volunteer project they’ve taken on. There are things they must do and things they cannot do. It’s a legally regulated relationship.”

The requirements for doing business apply to day-to-day operations as well. A California nonprofit that provided emergency food, shelter and education to at-risk youth operated within the spirit of the law, but did not document its expenses properly. Not only did the government end its funding – it also demanded repayment of \$250,000. The organization was forced to close its doors.

“Once the government gets hold of you, they don’t let go,” observes Peter B. Manzo, Executive Director of the Center for Nonprofit Management in Los Angeles. Good counsel would have insisted that the group keep meticulous records. “You want to do what you can so that you don’t come under scrutiny,” maintains Manzo.

Similarly, the State of California accused a Los Angeles-based nonprofit that operates a job-training program of mispending \$300,000. Addressing the situation without an attorney, the organization ceased serving its clients for 18 months, dedicating itself instead to finding proof of its expenditures. The group did manage to account for all but \$10,000, for which the founder was held personally liable. That time, the nonprofit squeaked by – barely.

To some these issues are obvious; but to far too many, trouble comes as a surprise. Nonprofit executives should know that attorneys have the knowledge to help nonprofits with a whole host of operational issues that have an impact on smooth functioning, such as sound human resource policies to protect the organization as well as the staff.

And what about the common transactions that a nonprofit must conduct regularly? For instance, who does an organization rely on to negotiate leases of property or major equipment? Significant time and money is easily squandered by entering into a contract when the nonprofit’s interests are not properly represented. Further, many nonprofits have intellectual property such as logos, web sites and publications, that must be protected.

One Solution – Pro Bono Legal Services

Even those groups who understand the importance of legal assistance and long for help typically don’t have the money to pay for legal costs, because most donors are far more interested in supporting the programs than in the mundane matters of general operations. Those who know about pro bono and would like to go that route are often deterred by the time it takes to find reliable free legal assistance and the commitment of staff energy necessary to making it work.

Guy Lescault of ABC, for example, sees a “total disconnect about knowing how to use lawyers and use them effectively” within the nonprofit community. The Urban Institute, a think tank in Washington DC, confirms that small and mid-sized nonprofits use attorneys less often than they should.

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Interviews reveal that many nonprofit executives assume that a lawyer is a luxury for nonprofits, especially when money is tight. “Legal help, especially when it’s preventative, is often a deferred expense,” says Sean Delany, Executive Director of Lawyers Alliance of New York, which matches pro bono lawyers with nonprofits whose programs benefit low-income communities. “In the long-run,” he notes, “that can create problems for many organizations.”

Whenever nonprofits are watching every penny carefully, their focus is usually – as it should be – on using their money to serve clients. It’s hard enough to raise sufficient money for programs. Getting funds ear-marked for legal fees almost requires a sorcerer’s spell. The money squeeze, a lack of awareness of the need for legal services, funders’ antipathy to legal expenses, uncertainty about how to find help and other factors can deter nonprofits from seeking legal help.

While these challenges can be daunting, they are usually not insurmountable. The widespread availability of pro bono legal services means that it is often possible for a well-run nonprofit to find quality legal help for significantly reduced, or even waived, fees. The American Bar Association states, “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay,” and

recommends that lawyers provide 50 hours each year in pro bono work for their communities.

A new generation of business lawyers is already beginning to volunteer to help nonprofit groups, both to fill the ethical mandates of the profession, and for their own sense of fulfillment. Commercial lawyers – until now a largely untapped resource – are eager to share their expertise and feel the satisfaction of working for the betterment of their community. And their law firms benefit as well. A willingness to provide their know-how and contacts can enhance any firms' reputation in the community. It also helps them train their younger associates (with the supervision of more senior attorneys), keeps their lawyers engaged, and helps with recruitment and retention. Most firms now recognize that the benefits of pro bono work flow both ways; they are incorporating pro bono into their normal business practice. The American Lawyer, for example, recently reported that pro bono at the 100 most profitable firms in America increased 20% in 2002; outpacing both revenues and head count. Esther Lardent, head of the Pro Bono Institute in Washington DC and a nationally recognized expert on law firm pro bono activities, estimates that a significant part of the increase is due to an increase in the amount of pro bono being done by business lawyers.

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Many nonprofits, however, are stumped when it comes to the nuts and bolts of finding quality legal services. Likewise, most law firms don't know how to find good projects or can't spend the time vetting nonprofits that need their special expertise.

In response to this need, a network of nonprofit organizations across the country that specialize in matching nonprofits with local legal resources has come into existence over the past five years. A story in the October 2002 issue of *Business Law Today*, a publication of the ABA's Section on Business Law, focused on this development and declared that the nationwide network of well-organized and professional intermediaries – groups that match qualified nonprofits with attorneys who have the necessary

expertise – is growing and is likely to keep growing in the years ahead. "The ultimate goal," the article states, "is to ensure that legitimate nonprofits get quality legal business assistance regardless of ability to pay."

One such intermediary organization, Community Legal Resources (CLR) in Detroit, has worked with over 130 nonprofits and provided close to \$1 million in legal work over the last three years. CLR acts as a kind of clearinghouse, using contacts within both the nonprofit community and the legal and business communities to match nonprofits with attorneys. The response from the area's attorneys, including legal staff from corporations like General Motors and Ford, has been enthusiastic.

Building a Legal Focus – A New Way to View the Future

In a Los Angeles senior citizen's center, the executive director customarily entered into leases without the benefit of any legal counsel. The group was on the verge of signing a general partnership arrangement to expand services and rehabilitate a building for affordable housing when the executive director thought review by an attorney would be a good idea.

"Not surprisingly," says Janet Lewis, Director of Public Counsel's Community Development Project, who helped the group, "the agreement was drafted from the point of view of the other partners. Our attorneys went through the contract and found the terms were awful. It wasn't even what was usual in the marketplace, including how the partners' proceeds would be split or who would guarantee what to lenders. In every situation our client was getting the short end of the stick. If our client signed [that agreement] it would have been seriously compromised." With help from a Public Counsel volunteer, that contract is being renegotiated so that all sides get a fair shake.

It's a challenge for many nonprofit organizations to stay on track and true to their missions. Ironically, nonprofits such as the LA senior citizens' center enter into many business transactions almost expecting to be powerless. That's where a strong team including an experienced business attorney can make all the difference. A transactional lawyer will know what practices or contract terms are customary. If a nonprofit's management has cultivated a long-term relationship with an attorney, that contact can also often refer them to lawyers with expertise in other areas where they may have legal challenges. That advice can save a nonprofit a bundle.

With an established attorney-nonprofit relationship, regular legal advice can become integral to the nonprofit's ongoing decision-making process. T. K. Conners of the Youth Development Clinic (YDC) in New Jersey recalls

a time when that organization was in a highly charged dispute with its landlord. She declares, “the best attorneys are like therapists. They help prevent you from acting out.” At a time when emotions were running high, YDC’s attorney helped to diffuse tension and resolve what could easily have been an explosive situation. Because the organization had nurtured that relationship, they trusted and followed the attorney’s advice, much to their benefit.

The positive impact can be far reaching when nonprofits access their legal community and get help in the areas where they face the greatest challenges.

Access to ongoing legal advice also makes it more likely that a nonprofit will have a more sophisticated and knowledgeable director and board. Calvin Holmes, Executive Director of the Chicago Community Loan Fund, used attorney advice to assess the benefits and risks of taking a second mortgage position. Thereafter, Holmes proceeded with greater sophistication, including protective covenants in contracts, insisting on more aggressive monitoring of loans that are in second position, and setting aside higher loss reserves.

Once attorneys become intellectually and emotionally invested in relationships with nonprofits, they’re often better able to find the most effective ways to help. They’re also more successful when it comes to strengthening existing

strategies or implementing new ones. For instance, when attorney Richard Allen helped the Center for Contemplative Mind in Society to requalify for 501(c)(3) status, his guidance also helped the organization identify new funding sources.

Then there’s the matter of interpreting laws and regulations. For instance, Allen reported that several nonprofits assumed they were prohibited from any lobbying activities whatsoever. In fact, lobbying and advocacy around public policy are often permitted. Indeed, public charities are allowed to spend up to 20% of their budgets on lobbying activities so long as that activity does not involve support for or opposition to a political candidate.

When nonprofit executives find attorneys to serve in a general counsel role, they get the often formidable legal and managerial experience that complements and augments their own talents. They’re reinforcing their own infrastructure, insuring that their organizations will be positioned to address many challenges more effectively.

When It’s Good, It’s Great

The positive impact can be far reaching when nonprofits access their legal community and get help in the areas where they face the greatest challenges. Nonprofits are left stronger and better able to provide their services to the populations who need them. But for attorneys, the impact can often be striking and even very personal. Joel Kellman, an attorney and one of the founding members of Community Legal Resources, put it this way: “When you see a new housing development, a drug store and a program for day-care near a local school, where there were crack houses and places that had been vacant for twenty-five years, and you helped bring that about, it means a lot.” ■

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