

Work Plans for Assessing an Organization's Legal Needs

These work plans are designed to help incoming counsel—or law students in a clinical legal program under a law professor's supervision—to do an initial assessment of an organization's legal needs, and to familiarize themselves with the organization's overall legal context. The work plans are set forth at the end of each of Chapters 1 to 10 and are consolidated here for convenience.

Chapter 1 Work Plan: Understanding an Organization's Basic Legal Context; Setting Goals

This work plan assists users in understanding the organization's overall legal context and begins to formulate plans to meet the organization's legal needs. It is a companion to Chapter 1, What Good Counsel Can Do for Nonprofits.

- ❑ Become familiar with the organization's mission, its programmatic functions, and activities.
- ❑ Understand who are the organization's key stakeholders: What are their interests in the organization, and how are those interests being served?
- ❑ Obtain and review the following key documents (guidance about what to look for in each of these documents appears in subsequent chapters' work plans):

- Certificate of incorporation, and any amendments filed.
- Current bylaws.
- IRS tax exemption letter.
- List of members of the board or governing body, including length of service, committee assignments, and any other board or corporate affiliations of each member.
- List of senior managers (direct reports to the CEO/ Executive Director), their experience in their functional area, length of service and current job descriptions; ascertain who is responsible for core managerial functions.
- Current operating budget.
- Financial statement.
- Business or strategic plan (if applicable).
- Most recent IRS Informational Returns (Form 990) and state charities office annual filings.
- ☐ Take a legal history of the organization.
 - Who incorporated the organization, and when? Obtain copies of the founding documents.
 - Does the organization currently have legal counsel?
 - What was the nature of any legal services rendered over the past several years, and by whom were they rendered?
 - Is the organization aware of local legal services groups that provide free or low-cost legal advice to qualifying nonprofits?
 - Who interacts with outside legal counsel on behalf of the organization?
- ☐ Does the board conduct orientation and training of members? What materials does it use?
- ☐ Is the organization considering a major structural change, such as a merger, joint venture, strategic alliance, partnership, dissolution, bankruptcy filing/restructuring of debts, or a change of mission, name, location, or service area?
 - Similarly, determine whether the organization wishes to terminate, modify or renegotiate the terms of such a joint arrangement.
- ☐ Ascertain whether there are any current or recent interactions with government regulators.
 - Pending, threatened, or imminent litigations, investigations, or governmental audits?

- ❑ Find out whether the organization is undergoing or anticipating a major change in leadership or governance.
- ❑ Are there any other overarching, pressing legal needs or concerns that the organization's leadership consider pressing? Who has primary responsibility for identifying and addressing current and imminent legal needs or concerns?
- ❑ What are the organization's expectations coming out of this legal review, and what time and resources are available?
 - Short term (over the course of a calendar quarter or school semester): conduct function-by-function review of organization's legal needs; locate resources to help address the most pressing questions.
 - Medium term (over the next one to three years): Prioritize and address non-urgent items that surfaced in the initial review; implement measures for ongoing assessment and education; formalize legal relationships and improvements.
 - Longer term (over the next three to five years): Review impact of legal and governance improvements on achievement of mission; flow positive results through to new initiatives, new grant applications, and new sources of funding; continually improve systems for detecting and addressing legal matters, develop and strengthen ongoing ties to knowledgeable members of legal community.
- ❑ What would the organization consider to be a good outcome of this legal overview? Are board, senior management, and other important stakeholders aligned?

Chapter 2 Work Plan: Corporate Law and the Requirements of the Tax Exemption

This work plan assists users in understanding the organization's corporate law context and its compliance with the requirements tax-exempt status. It is a companion to Chapter 2, Nonprofit Legal Basics: Corporate Law and the Requirements of the Tax Exemption.

- ❑ Ascertain form of organization, gather and review organizing documents.
 - Corporate charter, trust instrument, or association document.
 - Examine and understand agreements or understandings with member organizations, affiliates.
 - If the organization is a corporation, study bylaws.
- ❑ Determine whether the board has the requisite number of directors under applicable law and the bylaws, and whether they have been duly appointed.
- ❑ Determine whether the officer/leadership posts specified in the bylaws and/or by state law have been filled, and whether those persons are carrying out the duties prescribed.
- ❑ Ascertain whether the board membership consists of the number of representatives or designees of various interest groups, constituents, community groups, or affiliates required by the bylaws.
- ❑ Determine whether board members are under term limitations; if so, ascertain whether the organization has renewed or discharged the members whose terms have expired.
- ❑ Review tax-exempt application (Form 1023) and determination letter.
 - Include any IRS letter rulings specific to the organization.
 - Study current mission statement(s) and activities; determine whether organization's activities are within the authorized scope of the Purposes clause of organizing document and IRS determination letter.
 - Find out when was the last time the board reviewed the mission and assist in determining whether IRS disclosure should be updated.

- ❑ Determine whether the organization has registered with the appropriate state charities officials.
 - Has the organization taken appropriate steps to be exempt from state taxes, property taxes, and sales tax?
 - Has the organization taken appropriate steps to fundraise in the various states where it is active?
- ❑ Determine whether the organization is up-to-date with its filings of federal and state informational returns, and what role the board plays in review before filing.
- ❑ Determine how many trustees meet the definition of independence established by the IRS.
- ❑ Review conflict of interest policies, procedures, and questionnaires.
 - Who is responsible for enforcement?
 - Ascertain whether there are circumstances likely to give rise to concerns regarding private inurement of insiders.
- ❑ Inquire about transactions or relationships that may confer substantial private benefits.
- ❑ Ascertain existence, implementation, and enforcement of other key policies, in conformity with IRS expectations.
 - Document retention and destruction policy.
 - Whistleblower policy for accounting matters.
 - Gift acceptance policy.
 - Joint venture policy.

Chapter 3 Work Plan: Corporate Governance

This work plan provides a window into the quality of an organization's corporate governance. Using this work plan as a companion to Chapter 3, *Good Counsel* about Corporate Governance, counsel or supervised law students can also help trustees apply the somewhat theoretical principles of fiduciary duties—care, loyalty, and obedience—to the real business of governing their organization.

- ❑ Obtain a copy of board training/orientation materials or handbook.
 - Ascertain the board's understanding of the mission of the organization.
 - Understand how the board of directors discharges its oversight role.
 - Understand how well the boundary is observed between oversight (a board function) and day-to-day execution and management (a management function).
- ❑ Ascertain whether board meets regularly—when were its last several meetings?
 - Understand periodicity of board meetings and committee meetings, ascertain whether board (or executive committee) meets frequently enough to meet legal requirements and to assure good governance.
 - Review notice of meetings to ascertain whether properly given.
- ❑ Review attendance at recent meetings.
 - Is the quorum requirement met for business to be conducted?
 - Are there members who have missed several meetings consecutively or persistently?
- ❑ Determine whether votes are taken (in person, including by conference call or by written consent), and whether resolutions are moved, seconded and voted upon for the conduct of important pieces of business, in keeping with state law, bylaws, and good practices.
- ❑ Review minutes going back three to five years, including resolutions passed or other actions taken.
 - Do the minutes record the board's consideration of important organizational matters, properly record votes, appear

to be accurate and complete without being so detailed as to chill or obfuscate board discussions?

- Are they timely distributed to and reviewed by members in attendance, with the opportunity to propose corrections?
- ❑ Ascertain the extent to which the board genuinely debates and deliberates about proposals and makes informed decisions about important matters concerning the organization, its planning, and its execution of mission.
- ❑ Assess whether materials are timely distributed in advance of board meetings, providing ample opportunity for members to consider new or tabled agenda items and to fully understand draft resolutions and other proposed board actions.
- ❑ Understand whether the board and committee meeting schedule allows time for information gathering and consideration about how comparable institutions deal with similar problems.
- ❑ Ascertain whether board members have access to, and are permitted to ask questions of, outside experts such as lawyers, accountants, and investment advisors, as appropriate.
- ❑ Ascertain what duties have been delegated to committees (e.g., initial review of auditor's report by the audit committee, and/or the budget by the finance committee, and/or executive compensation matters by the personnel committee, etc.).
 - Review charters/mandates of committees.
 - Ascertain that committees then report out findings and recommendations to the full board.
- ❑ Determine whether board members meet periodically with members of senior management as appropriate, for example, the chair of the finance committee with the chief financial officer.
- ❑ Find out whether the board or its nominating/governance committee undertakes regular self-evaluations, board member evaluations, and organizational evaluations. Review recent evaluations as well as steps taken to carry out recommendations.
- ❑ Review executive compensation procedures.
 - Obtain minutes from most recent executive compensation review to assess compliance with legal requirements.

Chapter 4 Work Plans: Contracts and Intellectual Property: Laws that Matter to Program Staff

These two work plans can assist counsel or supervised law students in surveying an organization's contract and copyright law contexts. They are a companion to Chapter 4, Contracts and Intellectual Property: Laws that Matter to Program Staff.

Work Plan 1: Contract Administration

This work plan can assist counsel or supervised law students in surveying an organization's contracting procedures. It relates to the first part of Chapter 4, an introduction to contract law for program staff.

- ❑ Understand contracting procedures and how they differ throughout the organization.
 - How are contracts created, reviewed, and signed?
 - Who is responsible for overseeing compliance with contractual rights and duties?
 - Who keeps track of deadlines, renewal dates, expirations, and milestones toward completion?
 - Does the answer differ department to department?
- ❑ Determine whether there are particular contracts that the organization would like assistance with negotiating/renegotiating, drafting, reviewing, or understanding.
 - Vendors, funders, partners, others.
- ❑ Determine whether contract law presentations would help non-legal staff members become more conversant with the many and sometimes surprising forms that contracts can take.
 - Examples include work orders, donor pledge forms, enrollment forms, insurance policies, banking and credit application forms, intellectual property licenses, venue rental agreements, and click-through software licenses.
- ❑ Ascertain how legal review of contracts is sought and provided.
 - Is there a notification system to initiate review of a new contract?
 - Would it strengthen and streamline contracting procedures to have lawyers assist in pre-approving certain standard form contracts?

- Do non-lawyers receive training?
- Is there clarity about when counsel should be consulted in connection with contract review?
- Is there a database of executed contracts for current and future reference?
- Are signed contracts, invoices and payments coordinated with Finance and subject to the organization's system of internal accounting controls?
- Are contract matters such as legal notices, breaches, opportunities to cure, amendments, renewals and terminations referred for legal advice and handling?
- Obtain a copy of signing authorizations (if applicable) and ascertain the extent to which they are written, understood, and enforced.
 - Who is responsible for enforcing and updating signing authorizations?
 - Are there gaps between apparent authority and actual authority to bind the organization?
 - Would non-legal staff benefit from a presentation about authorization to bind the organization, and the dangers of apparent authority?

Work Plan 2: Copyright Administration

This work plan can assist counsel or supervised law students in surveying an organization's management of its copyrights. It relates to the second part of Chapter 4, an introduction to intellectual property law for program staff.

- Ascertain what steps are taken to ensure that copyrightable works created by employees in the course of their jobs belong to the company.
 - Review employment contracts, offer letters, employee handbooks, policies, and procedures under the work-made-for-hire doctrine.

- ❑ Ascertain whether the organization has a protocol for registering its copyrighted works for license to others.
 - Take stock of any copyrighted works owned by the organization.
 - Determine whether there are other works that are good candidates for registration.
- ❑ Determine whether the organization is currently licensing out any of its copyrighted works.
 - Gather and examine license agreements.
 - Understand what steps it takes to enforce terms of licenses.
- ❑ Ascertain the organization's means of monitoring, investigating, and handling unauthorized uses of its copyrighted works.
 - Formulate recommendations for any unauthorized uses that this process uncovers.

Chapter 5 Work Plan: Compliance with Fundraising Laws

This work plan can assist counsel or supervised law students in surveying an organization's compliance with fundraising laws. It relates to Chapter 5, *Counseling the Rainmakers: Legal Aspects of Raising Money*.

- ❑ Learn about the various ways in which the organization raises money:
 - Annual fundraisers, including general solicitations, galas, walks, runs, and auctions.
 - Restricted gift campaigns, including capital campaigns and endowment campaigns.
 - Other fundraising activities.
- ❑ Research fundraising laws in all states where the organization raises money, and review the organization's compliance with applicable laws.
 - Review agreements with outside fundraisers to ensure they comply with applicable state registration and disclosure requirements.
- ❑ Gather restricted gift documents and review organization's procedures for complying with donors' restrictions.
- ❑ Review the handling of endowment funds, including proper recordkeeping and expenditures of investment income and growth in compliance with the organization's spending policy and law.
 - Ascertain whether the organization has plans to invade principal, and if so, determine whether legal requirements such as donor notification, board and/or government approval have been met.
- ❑ Ascertain how the organization handles and secures donors' personal information and financial information such as checks, credit card numbers and bank account numbers.
- ❑ Review the organization's practices for providing receipts for donations.
 - Review form of receipts for donations over \$250.
 - Ascertain that receipts subtract the value of return benefits, such as gala meals and entertainment.

- Be sure that membership dues, services rendered, and other non-contribution payments are not included in charitable receipts.
- Understand procedures for issuing receipts for in-kind gifts.
- Review gift acceptance policy for large non-liquid gifts (or consider adopting one if such gifts are commonly made).
- ❑ Understand procedures for applying for, and certifying compliance with, governmental and private grants and contracts.
- ❑ Review pledge agreements for larger donations and/or payments over time.
 - Formulate recommendations to achieve greater enforceability, if appropriate.
- ❑ Review the organization's compliance with state and federal laws governing gaming and raffles.
- ❑ Understand all corporate sponsorship relationships and ascertain compliance with applicable federal regulations.
 - Rules regarding taxable advertisements.
 - Acceptance of corporate privileges.
- ❑ Determine who represents the organization when a planned gift is offered.
- ❑ Review any joint fundraising relationships and fiscal sponsorships.
 - Assess compliance with applicable tax laws, contractual obligations.

Chapter 6 Work Plan: Laws that Matter to the Finance Department

This work plan can assist counsel or supervised law students in surveying an organization's compliance with laws impacting the Finance function. It is a companion to Chapter 6, Laws that Matter to the Finance Department.

- ❑ Understand the organization's overall financial picture.
 - Study its business model and strategic plan.
 - Study its current operating budget and variances to date to understand its sources and uses of operating funds.
 - Study its financial statements.
 - Find out whether it operates on a fiscal or calendar year and determine when key events occur in the annual cycle.
 - Find out whether the organization accounts on a cash or accrual basis and determine what cash flow challenges it faces.
- ❑ Understand the organization's systems of preventive and detective internal controls and ascertain the role of legal counsel in supporting the control function.
 - Ask about any concerns, unusual book entries, accounts with balances that never seem to change over time, history of embezzlement or fraud perpetrated from within or outside the organization.
- ❑ Determine who provides legal information to the organization's external auditors.
- ❑ Obtain and review recent years' management letters from external auditors.
 - Note any significant deficiencies or material weaknesses.
 - Consider Legal's role in helping address any such matters.
- ❑ Understand insurance arrangements; consider adequacy of types and amounts of coverage.
 - Who interfaces with brokers, carriers, adjusters, and assigned counsel? Who handles reservations of rights and declinations of coverage? Who monitors litigation progress and potential settlements?
- ❑ Ascertain responsibility for handling of pension funds and compliance with law.

- ❑ Understand organization's treatment of profits and reserves in light of applicable laws.
 - Discuss adequacy of reserves in light of pending or threatened legal matters; insurance coverages.
 - Reserves to cover unfunded pension and postretirement liabilities.
 - Reserves to cover planned workforce reductions.
 - Reserves to cover meet terms of contingent matching grants.
- ❑ Review investment policies and procedures in light of applicable laws.
- ❑ Ascertain legal role in reviewing Form 990s and other filings, distributing to board.
- ❑ Understand the organization's sources of unrelated business taxable income.
 - Ascertain how UBTI arises, how it is reported and how UBIT is paid.
 - Obtain and review its recent Form 990-T filings.
- ❑ Determine other ways in which Legal can support the Finance function.
 - Determine how contracting process relates to Accounts Payable and Accounts Receivable areas.
 - Ascertain how minutes are kept for the finance, audit, and investment committees. Review recent meeting minutes for potential legal matters.
- ❑ If the organization is facing financial challenges, nearing insolvency, or considering dissolution, bankruptcy, or other restructuring, coordinate with board members and finance professionals to plan an orderly process for addressing circumstances.

Chapter 7 Work Plan: Human Resources Law for Nonprofits

This work plan provides an overview of legal issues that commonly arise for human resources professionals in nonprofit organizations. This work plan is a companion to Chapter 7, Getting Personnel: Human Resources Law for Nonprofits.

- ❑ Review procedures for employee applications, hiring, promotion, discipline, and termination.
 - Review employment contracts and offer letters, including statements of job responsibilities, reporting relationships, compensation, confidentiality provisions for those with access to sensitive or proprietary information, intellectual property assignments, term or at-will employment provisions.
- ❑ Review employee handbooks and methods for enforcing employee policies.
 - Leave policies.
 - Accommodations for employees with disabilities (temporary or permanent).
 - Policies implementing EEO, anti-discrimination, and anti-harassment laws.
- ❑ Review procedures for distributing employee handbooks, obtaining acknowledgments of receipt and assent.
- ❑ If the organization performs background checks, ascertain awareness of/compliance with laws and proper protocols for handling results.
- ❑ Review classification of workers as employees or independent contractors.
 - For tax purposes (W-2 or 1099) as well as for compliance with minimum wage laws.
- ❑ Review compliance with federal and applicable state and local minimum wage laws.
 - Determine whether employees have written job descriptions that accurately reflect what they do and whether they are exempt or non-exempt from wage and hours laws.
 - Ascertain whether internships and volunteer programs comply with legal requirements.
- ❑ Review termination and separation practices for compliance with law and sound risk management.

- ❑ Review any collective bargaining agreements and be familiar with the upcoming renewal dates, ongoing negotiations, current or recurring issues, and grievances.
- ❑ Review benefits programs and assess compliance with applicable laws.
 - Understand what benefits are provided to employees, including both required and optional benefits, COBRA requirements, and retirement benefit plans such as pension plans and 403(b) plans.
- ❑ Review compliance with immigration law, particularly I-9 Employment Eligibility Verification forms and work visas.

Chapter 8 Work Plans: Getting the Word Out, Legally: Counseling the Nonprofit Communications Team

These three work plans can assist counsel or supervised law students in surveying an organization's compliance with laws of concern to the communications department: marketing, public relations, and web site/social media professionals. They are a companion to Chapter 8, Getting the Word Out, Legally: Counseling the Nonprofit Communications Team.

Work Plan 1: Protecting and Enforcing the Organization's Trademarks

- ❑ Take inventory of the organization's trademarks.
 - Note all protectable marks in use by the organization.
 - Search the U.S. Patent and Trademark Office database (or commercial databases) under the company name.
 - Determine which marks may not have full protection in every class or every jurisdiction needed.
- ❑ Understand who is responsible for keeping track of deadlines for renewing trademark rights and for expanding coverage to new classifications and jurisdictions if the organization's activities warrant.
- ❑ Ascertain steps taken by the organization to regularly police for infringements of the organization's marks, both in traditional and digital media.
 - Inquire whether there are any pending disputes over the organization's marks.
 - Note what actions are generally taken by the organization to object to unauthorized uses or to respond to objections received by others.
- ❑ Collect brochures, publications, web pages and other places where the organization uses its marks to determine whether the organization appropriately applies the ®, ™, or ™ marks.
 - Weigh in on the branding and style guide so that it affords appropriate legal protections while promoting a consistent visual image for the organization's brands.
 - Strike a balance between protective use of marks and visual clutter.

Work Plan 2: Clearing Rights for the Use of Intellectual Property Belonging to Others

- ❑ Ascertain whether the organization is using, or wishes to use, rights-protected works of others.
 - Trademarks belonging to others.
 - Copyrighted works of others.
 - Rights of publicity—note special sensitivities regarding children, clients, patients, and the disabled.
 - Guild or union rights, patents, and trade secrets.
- ❑ Understand the organization's protocols for clearing rights and ensure that they include:
 - Correctly identifying the owner/administrator of those rights.
 - Requesting permission to use the work from the appropriate party.
 - Upon reaching agreement with the copyright holder, documenting that agreement in a written license agreement.
 - Understanding and complying with any restrictions on use.

Work Plan 3: Ascertaining Compliance with Consumer Protection Laws

- ❑ Review Web site Terms of Use and Privacy Policy for compliance with applicable laws.
 - The terms should begin upon the user's first access of the web site and end when such access is terminated by either party.
 - The terms should indicate that any content downloaded from the organization's web site by the user is for noncommercial, educational, or personal use only.
 - The terms should shield the organization from liability resulting from access to third-party web sites via links on the organization's web site.
 - The organization should establish (and include in the terms and conditions) an email address, such as `counsel@yourorganization.org` or a postal mail address.
 - The privacy policy should accurately disclose the various uses of personally identifiable data collected and provide opportunities to opt out or correct information.

- ❑ Determine whether mass-marketing emails and postal mailings provide required disclosures and the opportunity to opt-out.
 - Periodically check to ensure that opt-outs notices are complied with, both electronic and in other forms.
- ❑ If the organization runs sweepstakes, contests, games of chance or skill, ascertain procedures for complying with applicable laws.
 - Advance possession of prizes, no purchase necessary, posting of bonds as may be required, disclosure of rules containing required provisions.
 - For skill contests, additional rules apply.
 - Other disclosures may be required to comply with federal law (if mailed or otherwise in interstate commerce) and state law.
- ❑ If the organization engages in social media, ensure that good practices with respect to all matters listed in this chapter (trademark protection, rights clearance, consumer regulatory compliance, and general coordination with PR strategy) extend to the social media context as well.

Chapter 9 Work Plan: Legal Meets Operations, Facilities Management, and Security

This work plan can assist counsel or supervised law students assess the legal context for an organization's Operations department. It is a companion to Chapter 9, Legal Meets Operations, Facilities Management, and Security.

- ❑ Review all real estate arrangements and understand how they serve the organization's mission.
 - Understand procedures for board review and approval of key real estate arrangements.
- ❑ Chart out what facilities are owned/leased/operated/used by the organization.
 - Summarize key terms: prepare an abstract of leases and other key real estate agreements.
 - Ascertain responsibility for equipment, maintenance, systems, utilities, capital repairs, improvements, casualty losses, and relevant contractual relationships for each location.
 - Know basic terms of warranties for key equipment and know where warranties are kept.
 - Review building permits, certificates of occupancy, and insurance certificates.
 - Understand key points of interaction with government and ascertain procedures for handling permits, approvals, and violations.
- ❑ Determine what construction, expansion, or refurbishment plans are underway or contemplated.
 - Ascertain what special legal arrangements are appropriate and necessary, and determine who will handle them.
- ❑ Review forms of purchase orders and service agreements.
- ❑ Understand arrangements for security and interface with law enforcement.
- ❑ Review property and public liability insurance arrangements.
 - Make sure facilities risk management protocols comply with applicable law, lease/contractual requirements, and other expectations.

Chapter 10 Work Plan: Political Activities and Governmental Lobbying

This work plan is designed to assist counsel or supervised law students assess a Section 501(c)(3) organization's compliance with the prohibition on political activities and limitations on advocacy activity. It is a companion to Chapter 10, Political Activities and Governmental Lobbying.

- Review policies and practices for compliance with the absolute ban on intervening in political campaigns.
- Review lobbying activity to ensure it complies with applicable laws.
 - Public policy issues.
 - Limited, insubstantial part of the organization's activities.
- Check bylaws for conforming provisions permitting lobbying activity.
- Determine compliance with recordkeeping and registration requirements.
- Ascertain compliance with federal, state, and local reporting requirements and Form 990 disclosures.
 - Find out whether the organization has any significant history of regulatory action (missed filings, excise taxes, significant audit findings) that may bring additional scrutiny or heightened penalties in the event of a further violation.
- Find out whether the organization has made a 501(h) election.
 - If not, and explore whether such election would be beneficial.
 - If so, ascertain compliance with limits.
 - Make sure grassroots lobbying does not exceed the 25 percent cap.
- Assess whether planned or desired political activities suggest a change in corporate form, a spinoff or establishment of a subsidiary Section 501(c)(4) entity.

