

***Typical Legal Issues Facing  
Non-Profit Businesses  
VIRGINIA CLE***

CLE Course by Herb Rubenstein, JD, MPA, PGA

[www.herbrubenstein.com](http://www.herbrubenstein.com)

[www.leadershipforattorneys.org](http://www.leadershipforattorneys.org)

Member VA, DC and MD Bar

# ***Introducing Herb Rubenstein***

- Author, *Leadership for Lawyers* – 1<sup>st</sup> ed. NITA, 2005; 2<sup>nd</sup> ed. American Bar Association, 2008
- Served as General Counsel, Board Member and Consultant for numerous not-for-profit businesses including The Jelleff Boys and Girls Club, National Football League Alumni Association, Big Brothers/Big Sisters of Washington, Autism Society of Colorado, International Center for Appropriate and Sustainable Technology
- First person to teach a course in Virginia for CLE credit in the field of Leadership (2012 VA CLE) and taught, Entrepreneurship, Adjunct Faculty, George Mason University, 1998-2000

# ***Introducing Herb Rubenstein (Con't)***

- Litigator, Small Business and Non-Profit Lawyer - DC, MD, VA – 1984 to Present
- Washington and Lee, B.A.1974, Phi Beta Kappa
- LBJ School of Public Affairs, MPA, 1997; Georgetown Law, J.D. 1982
- CLE and CPE (Accountants) Presenter – Boards of Directors for Non-Profits, Leadership, Ethics, Professionalism, The Future of the Legal Profession
- Working on new book on the future of the legal profession and the courts
- Former Lecturer in Strategic Management, Graduate School of Business of the University of Colorado Denver, Global Energy Management Program

# *Learning Objectives*

- Learn about the many types of not-for-profit business classifications by the IRS, resources for non-profits and their lawyers and how to form, operate not-for-profit businesses: See: <https://www.stayexempt.irs.gov/home/starting-out/applying-section-501c3-status>
- Become aware of Virginia State Law as it applies to not-for-profit businesses 23VAC10-210-1070 <https://law.lis.virginia.gov/admincode/title23/agency10/chapter210/section1070/>
- Learn how to advise not-for-profit organizations regarding their special legal needs and litigation risk
- Learn the legal duties of the members of their boards of directors
- Learn how as a lawyer you can become part of the local and statewide not-for-profit ecosystem and connect your clients to resources at universities, government agencies and institutions that serve not-for-profit businesses in Virginia

# ***Learning Objectives (Con't)***

- Learn about the special challenges of multi-state not-for-profit organizations and international not-for-profit organizations
- Understand the current litigation challenges faced as more and more not-for-profits are being sued.
- Become skilled at providing timely, excellent legal advice for not-for-profits so they can prevent many future legal problems and avoid costly, litigation.
- Learn how to expand and improve your legal practice through helping clients properly form not-for-profits and representing not-for-profits throughout their life

# ***Practical Objectives of This Course***

- Assist you in learning how to be a more complete not-for-profit lawyer and how it fits in with your being a litigator and representing for-profit entities:
  - Expanding your legal practice and your influence
  - Improve your effectiveness
  - Improve your satisfaction as a lawyer
  - Make a greater contribution to the legal profession
  - Help others become better not-for-profit lawyers and officers, board members, volunteers, and donors
  - Help people and organizations in the non-profit sector become more ethical, better advocates for their causes and better non-profit administrators

# *Opportunities for Lawyers*

- Working with not-for-profit businesses:
  - Provides many excellent business referrals in every area of the law: I received two large med mal cases from two boards I served on early in my practice
  - Helps improve your brand and the reputation of you and your law firm
  - Improves your social capital, relationship capital which will produce more and better clients
  - Gives you a platform and experience to speak to the entire not-for-profit community (Rotary, Optimist, Ruritan, VFW, Kiwanis, etc.), write articles, promote local well-being, serve your local, state and national communities, network and contribute

# ***Generated by Artificial Intelligence***

- Put in these words in BundleIQ:
- Create outline for nonprofit law curriculum - legal issues
- BundleIQ AI Wrote after searching the Web:



# ***Generated by Artificial Intelligence (Con't)***

- 1. Introduction to Nonprofit Law: Overview of legal issues related to nonprofits, including formation, governance, and taxation.
- 2. Formation of Nonprofits: Requirements for forming a nonprofit organization in the United States, including filing paperwork with the IRS and state agencies.
- 3. Governance of Nonprofits: Understanding fiduciary duties and other legal obligations associated with running a nonprofit organization.
- 4. Taxation of Nonprofits: Exploring tax-exempt status and other tax considerations for nonprofits

# ***Overview and Importance of Not-For Profit Businesses***

- Over 1.5 million not-for-profit businesses in the US;
- Nonprofits in Virginia – 50,654 organizations in Virginia. These Virginian nonprofits employ 524,352 people, earn more than \$79 billion in revenue each year, and have assets of \$204 billion. See: <https://www.causeiq.com/directory/virginia-state/>
- Most important post initial step for not-for-profit businesses - Must file Annual Form 990 in lieu of Tax Filing, 990 includes substantial disclosure unless under \$50,000 in revenue then “postcard” – Strict Filing Deadlines or lose tax exempt status
- Not-for-profit organizations can grow into billion-dollar businesses, across all 50 states and over 100 additional countries
- Can create huge public benefits, help solve social problems, reduce crime, and bring our country closer together
- Can pay high salaries, well upwards of a million annually, but all salaries must be reasonable in the eyes of the IRS

# ***Overview and Importance of Not-For Profit Businesses (Con't)***

- Not-For-Profit Businesses support the dignity of the American individual and promote their social contributions to American democracy, the economy and meeting unmet social needs
- DE Tocqueville, in his book, *Democracy in America*, said in 1835 – Americans contributing to community organizations was our nation's most distinguishing feature promoting democracy and fostering hard work, initiative and ambition
- By their tax-exempt status, not-for-profit organizations are given a privileged place in the American economy
- Governed in Virginia by: Virginia NonStock Corporation Act: See: <https://law.lis.virginia.gov/vacode/title13.1/chapter10/>;  
<https://law.lis.virginia.gov/vacode/title57/chapter5/section57-49/>
- <https://law.lis.virginia.gov/vacode/title57/chapter5/>
- <https://www.vdacs.virginia.gov/about-division-of-consumer-protection.shtml>
- Now let's review the major types of not-for-profit businesses

# ***Section 1 – Basic Steps in Forming a Not-For-Profit Business***

- Reserve name in Virginia
- File Articles of Organization in State which states mission and vision whether it will be a membership organization or not and rights of members including voting rights, conflict of interest policy (sample written by IRS)
- Form 1023 including funding and business plan - Application
- Secure EIN and initial funding, apply for exemption from State/local taxes
- Select board of directors and officers and write contracts for all employees and directors and officers

# ***Section 1 – Basic Steps in Forming a Not-For-Profit Business (Con't)***

- Develop and secure intellectual property including logo, trademarks, copyrights
- Purchase necessary insurance, secure equipment and software
- Develop and approve by-laws and as necessary secure lease or purchase office space, or arrange for use of home as primary office, register in the City or County of Virginia, open bank account
- Many other generic steps and each lawyer NEEDS A GENERAL CHECKLIST AND ABILITY TO MODIFY IT TO SUIT THE PARTICULAR CIRCUMSTANCES OF THE NOT-FOR-PROFIT ORGANIZATION TO BE FORMED
- See:  
<https://www.harborcompliance.com/information/how-to-start-a-non-profit-organization-in-virginia>

# *Foundational Operating Principles*

- Organization produces no private financial benefit for members, officers, directors, but can pay reasonable salaries to employees and contractors
- All officers, employees, board members are stewards of the assets of the organization which must be used solely to achieve the mission and vision of the organization. Before disposing of property must notify VA Attorney General per: § 32.1-374  
<https://law.lis.virginia.gov/vacode/title32.1/chapter20/section32.1-374/>
- If not-for-profit undertakes business activities generally found in the for-profit sector, that directly and unfairly compete against for-profit businesses, those activities will be considered “un-related business income” and be taxed – Texas School Book nonprofit example

# ***Foundational Operating Principles (Con't)***

- Heavily regulated (potentially) by government: See: Office of Charitable and Regulatory Programs in the Office of Consumer Protection:
- <https://www.vdacs.virginia.gov/about-division-of-consumer-protection.shtml>
- <https://consumer.ftc.gov/articles/giving-charity>
- VA STATE GOVERNMENT CONSUMER HOTLINE TO REPORT DONATION OR CHARITY MALFEASANCE: *For further assistance call our Consumer Protection Hotline at 1-800-552-9963 if calling from Virginia, or (804) 786-2042 if calling from the Richmond area or from outside Virginia. Our business hours are 8:30 a.m. to 5:00 p.m., Monday through Friday.*

# *Section 2: Types of Non-Profits Beginning With § 501 (c) (3)*

- § 501 (c) (3) - <https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-501c3-organizations> -
- Not for the benefit of any individual (extra payments over reasonable salary, benefits and expense reimbursement triggers excise tax)
- Absolute prohibition against political activity –candidate support <https://www.irs.gov/charities-non-profits/charitable-organizations/the-restriction-of-political-campaign-intervention-by-section-501c3-tax-exempt-organizations> – revocation of Tax-Exempt Status
- Voter (and issue) education, non-partisan voter registration, get out the vote drives are allowable
- Can be Private Foundation - §509(a) The default value to the IRS - (more than 1/3 of money coming from one source – donations not tax deductible unless special provisions in organizational documents and excise taxes on income. See: <https://www.irs.gov/charities-non-profits/charitable-organizations/private-foundations> and <https://www.irs.gov/pub/irs-pdf/p557.pdf>. See especially page 30 et al.



## § 501 (c) (3) (Con't)

- Can be public charity – must show “broad public support,” or support “public safety,” or provide other necessary information on Form 1023 which is the application for 501 (c) (3) public charity status due within 27 months of organization, retroactive approval to date of organization – all donations tax deductible
- Rules per 509 (a) (2) – Support test: greater than 33.33% from sources other than main source of support
- Can be exempt from state and local sales, property and excise tax (by filling out proper forms) and can receive lower cost postage services
- Limited legislative activity (lobbying) – 20% of total expenditures if total is less than \$500K, other rules apply for different size organizations – See p. 47 of: <https://www.irs.gov/pub/irs-pdf/p557.pdf>

# § 501 (c) (3) (Con't)

- Lots of tests for 501 (c) 3 organizations – overall name of these organizations "Charitable, Scientific, Religious, Literary, Educational (including private schools, tutoring organizations and all auxiliary organizations including book stores, school related clubs, etc.), Testing for Public Safety, Amateur Sports, Anti-Poverty or Anti-Disease Focus, and Cultural" orgs
- Can be a Trust, but beyond the scope of this course
- Virginia Horse Center Foundation is a 501 (c) 3 organization as are Public Interest Law Firms, Hospitals, Make loans or insurance available to charities (charitable risk pool), provides scholarships, "related" to other recognized not-for-profit organizations, broad based categories....under the concept of "*provides public services...*" (author's words)

# §501(c)(4)

- Civic Leagues and Social Welfare Organizations – Page 48 et al., <https://www.irs.gov/pub/irs-pdf/p557.pdf>  
Must file form 8796.
- Housing and Community Associations, Airports, Sports Leagues, Community Newspapers, Public Service Organizations, Architectural preservation, Economic Development, Volunteer Fire, Social Clubs
- Donations tax deductible as business expenses only
- Powers, like all nonprofits, must be spelled out in the By-laws of the organization and followed, must be formally amended if scope changes or is expanded

# §501(c)(5)

- Unions, Labor Organizations, Agricultural and Horticultural Organizations,
- File form 1024
- <https://www.irs.gov/charities-non-profits/other-non-profits/life-cycle-of-an-agricultural-or-horticultural-organization>
- Labor Unions can run pension funds, own hospitals and health services' organizations

# §501(c)(6)

- Business Leagues, Chambers of Commerce, Trade Associations, Boards of Trade, International Trade Centers/Organizations, Stock Exchange
- Form 1024
- Can lobby (legislative activity)
- Must be primarily supported by membership dues and activities carried out in support of its mission
- Can receive advertising revenue from its publications, website, and charge fees for educational programming
- See: <https://www.irs.gov/pub/irs-pdf/p557.pdf>
- Limited charitable deductions but business deductions for most payments made to organizations

# §501(c)(7)

- Social and Recreational Organizations- College Fraternities, Sororities, Mixed Gender Organizations, Country Clubs, Dinner Clubs, Hobby Clubs, Garden, Bird Watching, Fishing Clubs, Sports Clubs,
- Special rules – 15% max on non-member income and doing “non-traditional” things (like home delivery of food to members)
- File 1024
- No discrimination allowed, but not often enforced by the IRS – growing area with 87,000 new IRS agents, cannot claim “religious liberty” exemptions

# **§501(c)(8) and (10)**

- **Fraternal Beneficiary Societies and Domestic Fraternal Societies**
- Fraternal beneficiary societies provide for the payment of life, sick, accident, insurance, or other benefits to their members or their dependents (including burial, funeral payments and ownership of burial plots – (Jews who were excluded from many cemeteries in the New York area bought these plots over 100 years ago and continued, now giving out these plots) as a public service to a targeted and generally underserved audience
- Domestic fraternal societies but rather devote their earnings to fraternal, religious, charitable, etc., purposes
- Donations generally deductible as charitable donations
- Lodges, as local chapters, generally operate somewhat independently from the parent or national organization
- Strict accounting procedures

# ***Other Sections – Honorable Mention***

- Employees' Associations of various types under (c) 4, 9 and 17
- Supplemental UI Benefits for employees - (c) 17
- (c) 12 – Local Benevolent Life Insurance Association, Mutual Irrigation and Telephone Companies run as nonprofits, etc. Must collect 85% of income from “members,” money only used to cover financial losses from service...
- c) 14 Credit Unions, Mutual Financial Companies
- c) 17 – Cemetery Companies
- c) 19 - Veterans' Organizations
- c) 21 – Black Lung Benefits' Trusts
- c) 2 – Title Holding Companies for Single Parent Corporations
- c) 25 - Title Holding Companies or Trusts for Multiple Parent Corporations
- Foundations – Typically funders of other not-for-profit business usually 501 (c) 3 and can be Private Foundations, few donors, and can make grants to other not-for-profit businesses with at least 5% of its asset base given away each year (including overhead) or public charity such as community foundations. See: <https://www.irs.gov/pub/irs-pdf/p4221pc.pdf>
- See also: <https://cof.org/content/foundation-basics>



# Other Sections – Honorable Mention (Con't)

- c) 2 – Title Holding Companies for Single Parent Corporations
- c) 25 - Title Holding Companies or Trusts for Multiple Parent Corporations
- c) 26 – State-Sponsored High Risk Health Coverage Organizations
- c) 27 – Qualified State Sponsored Workers' Compensation Organizations
- c) 29 – CO-OP Health Insurance Issuers and Qualified Non-Profit Health Insurance Issuers

# ***Political Action Committees – Commonwealth of Virginia***

- [https://www.elections.virginia.gov/media/forms/warehouse/campaign-finance/2018/politicalcommittees/pac/PAC\\_Summary.pdf](https://www.elections.virginia.gov/media/forms/warehouse/campaign-finance/2018/politicalcommittees/pac/PAC_Summary.pdf)
- § 24.2-946 of the Code of Virginia
- Campaign Finance Disclosure Act (CFDA or the “Act”), Chapters 9.3, 9.4 and 9.5 of Title 24.2 of the Code of Virginia
- Policies adopted by the Virginia Department of Elections
- Rules governing the role of the Treasurer
- Any person, association, organization or group of individuals that solicits, collects and spends more than \$200 on one or more candidates running for office in Virginia (with some exceptions like Town Office Candidate in towns of less than 25,000 population) must register as a Virginia PAC and submit a Statement of Organization with the Virginia Department of Elections within 10 days of organization or expectation of receiving \$\$

# ***Political Action Committees – Federal***

- Select name, Custodian of Records, Treasurer, Assistant Treasurer, Administrator and Chairperson, EIN, Prepare By-laws, Corporate or other resolution approving PAC and File Registration Form with the FEC
- Agencies watching/investigation PACS – DOJ, FBI, FEC,
- Typical Issues: FCPA, Bribery, Source of Funds Illegal (may be foreign citizen or government), federal Tax Law violations, Reporting violations by candidates regarding the money received from your PAC, Coordinating with a Candidate
- No Cash allowed, all political contributions and use of funds must be documented
- All fundraising materials must be archived and available for review

# ***Political Action Committees – Federal (Con't)***

- Once the PAC meets the threshold of six months, 51 contributors and five contributions, it is known as a “qualified multi-candidate committee” and must file an FEC Form 1M with the FEC within 10 days of meeting the last of these three criteria to notify the FEC that it is qualified. A multi-candidate PAC must also identify this status on its check stock. (See Source below)
- Many law firms have information on their websites to help form or defend against investigations of PAC’s including:  
<https://www.venable.com/files/Publication/41143e25-398c-407e-a1ea-f70f86cfded7/Presentation/PublicationAttachment/e4aa0ea9-0543-4c03-99b2-0216e4f950ed/Forming a Corporate PAC MARCH-2012.pdf>

## ***Section 3 – “20” Typical Legal Issues Faced by Not-For-Profit Businesses***

- Listed in a general “soft” priority order, but every issue is VITALLY IMPORTANT and can lead to the termination of the organization or its tax-exempt status and can promote/impede growth
- Number 20 down to number 1 (most important or pervasive), that every lawyer needs to know about.
- Every not-for-profit must have legal safeguards in place for every one of these 20 legal issues. They are all very important, even critical for the survival, not just the continued existence of a tax-exempt entity

# ***Number 20 – Sex and Gender***

- Sexual Abuse/Predatory Practices
  - Policies, Training, Monitoring via Hotline or other anonymous, safe reporting system, Quick and accurate adjudication and systems, Discipline and Reporting, Insurance, Litigation Risk, Whistleblower Risk, Hiring Due Diligence, Record Keeping, Role of Board of Directors In Managing and Governing This
- Sexual harassment, sexual discrimination in the workplace
  - Lack of equal pay or promotion for equal work violates Equal Pay Act, ADA, ADEA and Title VII of the Civil Rights Act of 1964, See: <https://www.eeoc.gov/equal-paycompensation-discrimination>; Hiring bias based on sex and gender
  - Sexual Harassment broadly defined under Title VII - unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.
- Single gender organizations – future line of challenges, should have clear rationale for this vs. inviting all genders to participate

# ***Number 19 – Insufficient Human Resource Policies and Poor Employee Relations***

- Insufficient or non-existent Employee Handbook, Employee Policies, Recordkeeping of complaints, employee evaluations, bases for termination
- Burnout and High Turnover, Wrongful Termination, Age Discrimination,
- Large Number of Vacancies, some filled with “Unpaid Internships”
- Low Pay, Limited Training, Uncompensated Overtime, Poor Onboarding, Lack of Job Congruity – What EE is told does not match job – And this applies as well to Senior Officers all the way down the line
- Insufficient Benefits, Bonuses, Awards for All Categories of Employees
- Poor EE evaluation system including objective for promotion

## ***Number 19 – Insufficient Human Resource Policies and Poor Employee Relations (Con’t)***

- Poor or non-existent progressive discipline system for violating organization policy, ethics violation, harassment
- Failure of CEO, Senior Officers, Staff and Board to Listen, Acknowledge, Support Employees
- Breeds Whistleblower Complaints, Hurts Reputation
- Rarely seeks to win “Best Places to Work” type awards
- And much of this narrative applies to “Volunteers” and “Interns” as well
- Often use “full-time” contractors - avoid employee related taxes, benefits and laws
- Poor career ladder policies



## ***Number 18 - Poor Financial Administration***

- NYU – 3.3m theft, Seton Hall 1m theft in 2022 – Employee Theft
- In September 2022 Black Lives Matter Global Network Foundation – Executive Accused of 10m in “siphoning” of funds after being paid \$2,167,894 for eight months’ work:  
<https://www.cnn.com/2022/09/04/us/black-lives-matter-executive-lawsuit/index.html>
- NRA Admits lax financial oversight and mis-spending by executives in 2020 -  
[https://www.washingtonpost.com/politics/nra-irs-disclosure-990/2020/11/25/50521108-2d34-11eb-9c71-ccf2c0b8d571\\_story.html](https://www.washingtonpost.com/politics/nra-irs-disclosure-990/2020/11/25/50521108-2d34-11eb-9c71-ccf2c0b8d571_story.html)
- Lack of accounting firm doing proper work or audit if over 750k as required by Virginia law
- Lack of two signatures required on checks (preference)

# ***Number 18 - Poor Financial Administration (Con't)***

- Failure to track restricted funds (Princeton, Brooklyn College)
- Inaccurate/no reporting of in-kind donations
- Misclassification of workers as independent contractors – No officer or board member can be “independent”
- Failure to track contracts with Board members or people related to officers and directors
- Poor ability to identify and respond to appropriate grant opportunities (preference); related to poor document and record keeping system
- Failure of Board to pass an annual budget or track expenses
- Failure to track expenses by project, especially on grants or restricted gifts
- Failure to properly calculate overhead, fundraising expenses

# ***Number 17 - Poor Document Management and Administration***

- Poor recordkeeping and filing systems
- Poor tracking of dates when board member's terms began and the term ends
- Lack of access to documents easily by Board
- Lack of contracts filing and management system
- Lack of software and other license expiration dates
- Lack of proper filing system for all key legal documents, including deeds, intellectual property inventory, wills and trust documents for donors

# ***Number 16 – Lack of Adequate Succession Planning***

- At the CEO and all officers' level
- At the Board level
- At the supply chain level, including all vendors
- At the Volunteer management/support levels
- At the major donors' level
- At the program managers' level including lack of career ladder for employees

# ***Number 15 – Insufficient Pro-Active Legal Representation***

- Legal representation that can and will identify “red flags” and legal gaps in legal documents, implementation, legal compliance,
- Lack of proper “board secretary role”
- Lack of proper “legal representation budget”
- Lack of clear list of duties and responsibilities allocated to “outside counsel” or included in “in-house” legal counsel
- Lack of regular litigation risk assessment
- Lack of regular anticipatory ethics threat assessment

# ***Number 15 – Insufficient Pro-Active Legal Representation (Con't)***

- *Duty to inform* not-for-profit client about current litigation around the country against not-for-profit organizations
- DC- AG Racine wins 3 cases against not-for-profit organizations in 2022, See: <https://oag.dc.gov/release/ag-racine-announces-victories-three-nonprofit>
- Public Media Lab and Manifold Productions, Inc.: Funnelled money from not-for-profit to for-profit and money disgorged and given to another ORG.
- Pavilion USA 2020, Inc.: Improper payments of 360k to Officers - money disgorged and given to another ORG.
- Delta Phi Epsilon Foundation: Not-for-profit paid money towards purchase of Founder's home - money disgorged and given to another ORG.
- Clawback of \$750,000 from Trump Presidential Inaugural Committee for private use of donated funds.

# ***Number 15 – Insufficient Pro-Active Legal Representation (Con't)***

- Mayo Clinic sued for unrelated business income taxes
- Harvard, UNC sued for Admissions Policies
- Sutter Health System sued for acting like a for-profit company rather than non-profit health organization; Note - Children's Hospitals often produce substantial annual cash flow
- Virginia not a hotbed regarding litigation against non-profits, but might be coming to a theatre near you in the near future – Be ready.
- Religious liberty – increasing in scope and will create future litigation for some not-for-profits not willing to serve groups whose life-style violates their beliefs

# ***Number 14 – Ethics Violations***

- Lack of ability for employees, vendors, donors, volunteers to report ethics via Hotline violations (Visiting Nursing Association of New York)
- Rise of whistleblower protections, awards of legal fees, awards of 10-30% of fines even to people involved in ethics or compliance violation but who did not spearhead it including former CEO's
- Lack of action on reported ethics violations often leaving out legal counsel entirely until too late
- No adequate adjudication system in-house
- Poor communications throughout not-for-profit about ethical problems and how they were/are dealt with
- Conflicts of interest with Board and Officers on contracts, loans not documented in writing, expense accounts
- Lax oversight by in-house counsel and retained legal counsel



# ***Number 13 – Intra-Organization In-Fighting, Silos, Withholding of Info***

- Organizations can have a position (6 month term) Director of Board Relations (preference)
- Organization should have for employees reporting and mediation support for disputes early in their development (preference)
- Document repository available to all officers and Board members
- Role of lawyer – observe conflicts and bring them to attention of officers, possible mediation role representing only the organization
- Black Lives Matter – Two related organizations fighting in litigation put damper on this “cause’s” rapid rise to success

# ***Number 12 – Poor Contract Management and Supervision***

- Allows for failures to comply with terms of contracts to the detriment of not-for-profit and significant litigation risk
- Needs to go all the way back to the RFP Process or contract award disputes possible
- Lack of use of contract management software to highlight all obligations and key dates
- Lack of use of contracts for many activities including banking and loans arrangements, fundraising vendors, written, accurate employment contracts, payroll administrators, use of intellectual property
- Lack of change orders being written into contracts
- Lack of monitoring contract performance either in real time, or using predictive analytics to identify future contract failures in time to head off disaster (preference)

# ***Number 11 – Insufficient Use, Management and Documentation of Volunteers***

- Poor volunteer “work” records tracking time and duties for each volunteer, poor management and deployment
- Poor volunteer screening, onboarding and training process
- Failure to use \$29.95 per hour “value” given as estimate of “donation” for each volunteer hour
- Poor volunteer “human resource” files/records
- Can lead to litigation risk, reputation risk, legal risk due to injuries to volunteer or client per failure to understand “gross negligence standard” as it applies to defeat general “immunity from suit” against not-for-profit businesses in personal injury and workplace injury (tort) situations
- Lack of evaluation feedback from volunteers after every volunteer effort by every individual (preference)

# ***Number 10 – Poor Strategic Alliance Management and Documentation***

- Lack of use of contracts for strategic alliances with other not-for-profit businesses, educational institutions, and for-profit companies
- Note: There is the Association of Strategic Alliance Professionals (ASAP) that has members that can help guide not-for-profit businesses in this critical area
- Lack of use of contracts and proper contract management of joint ventures with other not-for-profit businesses, educational institutions, and for-profit companies
- Lack of legal standards and legal review for such contracts
- Lack of quantifiable goals, timelines, and clear exit strategies for JV's and strategic alliances by not-for-profit businesses causing unnecessary and unproductive litigation risk

# ***Number 9 – Cybersecurity, Privacy, Ransomware Risk Management***

- Increasing threat to not-for-profit businesses rising to the level of Board of Directors' attention, and attention of in-house or outside counsel, especially with regard to adequate insurance, adequate internal controls, state of the art information technology and back-ups
- Poor internal computer use protocols threaten privacy of everyone associated with the organization, including vendors
- Poor internal allocation of “duty of care/standard of care” within not-for-profit businesses and their counsel regarding this important new threat to organizations

# ***Number 8 – Failure to Develop, Exploit and Protect Intellectual Property***

- Lack of sufficient IP attorney budget and work
- Failure to document and inventory all intellectual property
- Failure to apply for appropriate trademarks, patents, protect trade secrets
- Failure to have ownership rights regarding works for hire and employee rights to IP clearly identified in all contracts
- Failure to write cease and desist letters and charge properly for use of IP (RedCross, 1993)
- Failure of Board to govern and dig deep into this area for most not-for-profit organizations
- Failure of officers/staff to allocate responsibility for this in a job description

# ***Number 7 – Failure to Assess and Manage Litigation Risk***

- No annual audit of litigation risk by many not-for-profit organizations often due to lack of budget for this litigation threat assessment to be done by competent independent counsel or in-house counsel
- Failure to perform proper annual insurance audit to have coverage for all areas
- Failure to give timely notify insurance carriers of notice of claim (Harvard \$15m policy failed to notify, insurer off hook in admissions case with \$27 already and counting in legal fees – insurer would have paid)

# ***Number 7 – Failure to Assess and Manage Litigation Risk (Con't)***

- Avoid litigation with related not-for-profits:

See: Black Lives Matter Grassroot vs. BLM Global Network Foundation - <https://www.todaysgeneralcounsel.com/black-lives-matter-ripped-by-litigation/>

- <https://www.scribd.com/document/591075168/Black-Lives-Matter-Grassroots-v-BLMGNF>
- <https://www.usatoday.com/story/news/nation/2022/09/06/black-lives-matter-foundation-10-million-lawsuit/8003798001/>
- and <https://www.charitywatch.org/charity-donating-articles/legal-battle-ensues-over-control-of-black-lives-matter-global-network-foundation-funds>



# ***Number 7 – Failure to Assess and Manage Litigation Risk (Con't)***

- Avoid litigation with State Governments:
  - NRA related litigation – Avoiding government litigation challenging propriety of actions of a nonprofit
  - <https://www.usnews.com/news/politics/articles/2022-03-02/judge-blocks-nys-bid-to-shutter-nra-but-lawsuit-continues>
  - <https://news.bloomberglaw.com/business-and-practice/nra-donors-revive-near-dead-lawsuit-after-finding-new-lawYERS>
  
- Other areas where State Governments can file suit to take money or shut down org:
  - a. Operating outside of mission statement or in violation of law:
  - b. Financial reporting violations
  - c. Improper handling of expense accounts
  - d. Illegal campaign contributions
  - e. Conflicts of interest and self-dealing
  - f. Illegal source of contributions – “Epstein” money rule
  - g. Not registering in states where the nonprofit raises funds and/or does business

# ***Number 6 – Lack of Whistleblower Protection and Support Policies***

- Virginia Law: See VA Code: § 2.2-3009, et.seq; § 40.1-277.3;
- <https://law.lis.virginia.gov/vacodepopularnames/the-fraud-and-abuse-whistle-blower-protection-act/>
- Knowledge and meeting the standards of the 2022 Anti-Money Laundering Improvement Act.
- Keeping up to date with the 55 Federal Whistleblower laws and 49 applicable state laws
- Have adequate safeguards and protections for all whistleblowers speaking up with truthful information about the not-for-profit business
- Having a “speak up policy” for whistleblowers advocated by PWC since 2013
- Understanding the role of accountants in reporting as whistleblowers what nonprofits are doing as identified by Thomson Reuters in 2005
- Knowing the full costs and penalties that can accrue if a truthful whistleblower goes public to a federal agency

# ***Number 6 – Lack of Whistleblower Protection and Support Policies (Con't)***

- Understanding the role of accountants in reporting as whistleblowers what nonprofits are doing as identified by Thomson Reuters in 2005
- Knowing the full costs and penalties that can accrue if a truthful whistleblower goes public to a federal agency
- Know the full import of the AICPA rule to go into effect June 30, 2023 that every accountant must report NOCLAR – non-compliant activity by every client, sometimes to the audit committee or the board or directly to a governmental agency
- Know the full import of the AICPA rule to go into effect June 30, 2023 that every accountant must report NOCLAR – non-compliant activity by every client, sometimes to the audit committee or the board or directly to a governmental agency

# ***Number 5 – Employment Related Risk***

- As previously discussed:
  - Harassment, improper classification of employee,
- No longer operative or enforceable non-disclosure agreements and failure to update them for all employees, contractors, vendors
- Family And Medical Leave Act – 12 weeks of unpaid leave a year - if applicable (50 or more employees on location or within 75 miles, 12 months service, minimum 1,250 hours worked
- <https://www.dol.gov/general/topic/workhours/fla>

# ***Number 4 – Lack of Legal Planning for the Future and for Growth***

- Lack of seeing legal benefits and legal risks involving the future of the organization, the sector in which it operates and the internet including:
  - Web 3 potential of block chain technology, NFT's, Distributed Autonomous Organizations, DeCentralized Finance, Artificial Intelligence
  - Cryptocurrency (should organization accept donations in cryptocurrency) and all of the legal protections to secure this asset
  - Preparing for large scale donations (stock) and how to deal with it immediately in unsettled markets, donations of privately held and not easily transferrable stock in family businesses and start-ups
  - Use of social media – risks and rewards
  - Lack of plan to grow to become a multi-state or international nonprofit
  - Lack of plan for considering mergers or acquisitions with other not-for-profit businesses (which are brutal to implement even if legal counsel is pro-active in this regard, and virtually impossible if legal counsel is not pro-active)

# ***Number 4 – Lack of Legal Planning for the Future and for Growth (Con't)***

- Use of social media – risks and huge rewards
- Lack of plan to grow to become a multi-state or international nonprofit
- Lack of plan for considering mergers or acquisitions with other not-for-profit businesses (which are brutal to implement even if legal counsel is pro-active in this regard, and virtually impossible if legal counsel is not pro-active)
- Futurist William Halal, George Washington University predicting a banner economic year in 2025

## ***Number 3 – Failure of Compliance with Laws and Regulations of Not-for-Profit Law***

- Hundreds of laws apply and must be followed to protect exemption
- Strict compliance with By-Laws
- Compliance checklists must be used and followed
- Actions must be consistent with mission and vision as stated by the organizations
- Board of Directors' responsibility along with legal counsel to investigate every allegation of corruption and often this is not done

## ***Number 3 – Failure of Compliance with Laws and Regulations of Not-for-Profit Law (Con't)***

- Dissolution of a not-for-profit business must be done in accordance with the applicable state and federal law
- Illegal campaign contributions, coordinating with candidate campaigns, creation of shell entities to funnel money, overpayment of executives, improper investment strategies based on mission of organization (speculative), failure to fund pensions of officers, offering insurance to members without a license, raising money for particular project and not spending the money on that project or geographical or need-type area, misuse of bankruptcy proceedings to shield not-for-profit organization of penalties, fines and potential loss of tax exempt status via state litigation



## ***Number 2 – Poor Governance and Failure at the Board of Directors' Level***

- Huge Issue including:
  - Self-Dealing, Boy Scouts in Connecticut selling land to Board Member, Fought It and Won
  - Not abiding by By-Laws, properly amending them
  - Lack of term limits for board member (preference)
  - Inactive, inattentive board members and no board of directors evaluation system (preference)
  - Lack of proper board annual evaluation of CEO
  - Nepotism and its related risks (lack of independence)
  - Insufficient minutes for board meetings or no meetings at all of board of directors or members as required by By-Laws

## ***Number 2 – Poor Governance and Failure at the Board of Directors’ Level (Con’t)***

- Failure to register in all states where funds received or solicited
- Failure to file proper paperwork for registration, 990, Amendments
- Failure to have the following committees: (preference)
  - Audit, Finance and Investment Committee to insure proper financial controls
  - Nominating committee for board selection
  - Governance committee to deal with by-laws
  - Intellectual property committee
  - Fundraising and Development committee
  - Communications committee
  - Facilities committee
  - Membership
  - Human Resources committee
  - Executive Committee

# ***Number 1 – Failure to Plan For, Purchase, and Deploy State of the Art Information Technology***

- Issue limits not-for-profits' ability to grow, serve its clients, protect privacy, manage intellectual property, manage documents
- If lawyer or law firm does not use state of the art information technology, then how can the lawyer or law firm advise competently (Rule 1.1) the non-profit
- Issue prevents not-for-profit management from knowing what is going on inside of the organization or with joint ventures, compliance, strategic alliances, etc.
- Leads to failure to maximize donations and properly account for their deployment in the mission of the not-for-profit business

# ***Number 1 – Failure to Plan For, Purchase, and Deploy State of the Art Information Technology (Con't)***

- Limits recruiting among GenZ, millennials and younger donors
- Limits development and protection of Intellectual Property
- Limits communication with all audiences and creating community necessary to support a not-for-profit business
- Harms reputation, reduces capability to recruit high tech board members
- Promotes competition by more tech savvy not-for-profit organizations
- Limits Grant Award Potential with modern, forward-looking foundations
- Can lead to social media, cybersecurity and privacy risks

# ***Section 4 - Conclusion***

- I have not hit all of the major legal issues – they are infinite, but the overall theme is clear – follow the rules or lose the privileged status of being tax-exempt and having people give you money because of what you promise to do – ***leadership***. *In the nonprofit world, money follows leadership.*
- Squeaky clean must be the exacting standard for operations
- If not, whistleblowers, upset donors, employees on their way out the door or appropriately seeking a promotion taking the job of a supervisor who would not listen to the whistleblower when he or she had the chance, social and print media, all can and will let the world and government know of misdeeds by not-for-profit businesses; See:  
<https://news.bloomberglaw.com/business-and-practice/nra-donors-revive-near-dead-lawsuit-after-finding-new-lawYERS>

# ***Section 4 – Conclusion (Con't)***

- Extraordinary level of care in how organization receives and spends money, approves, pays, and reimburse expenses, works with other not-for-profit businesses and for-profit businesses and documentation of every operational area
- Pro-active lawyering and demand for a reasonable budget for legal fees along with excellent *pro bono* work by lawyers and law firms are all essential to help not-for-profit businesses reach their potential and serve our great need for their services
- The need for not-for-profits is greater than ever with our growing homelessness populations, growing immigrant populations, and shrinking government budgets relative to the challenges we face.

# Section 4 – Conclusion (Con't)

- Did not cover much about or as we say in Academia – *Areas of Future Study*:
- Foundations
- How to “dissolve or wind up” a not-for-profit business
- Merger and acquisition issues related to not-for-profit businesses
- International issues
- How a not-for-profit can own a “for-profit business”
- How not-for-profit businesses can create alliances with for-profit-businesses – like the United Way Executive On Loan Program, etc. See: <https://unitedwaygmwc.org/Loaned-Executive-Program>
- Litigation strategies available only to not-for-profit businesses (differences in legal standards, gross negligence vs. ordinary negligence, immunity from suit offered by some states, etc.).
- In Virginia, non-compete agreements are enforceable if an employer can show: **the restriction is “no greater than is necessary to protect the employer's legitimate business interest”**; the agreement is not excessively severe or oppressive in restricting the employee's ability to find another job or make an income; Same standard as for-profit entities
- [See: Virginia Law on Non-Compete Agreements](#)

# ***Section 4 – Conclusion (Con't)***

- Litigation strategies available only to not-for-profit businesses (differences in legal standards, gross negligence vs. ordinary negligence, immunity from suit offered by some states, etc.).
- In Virginia, non-compete agreements are enforceable if an employer can show: **the restriction is “no greater than is necessary to protect the employer's legitimate business interest”**; the agreement is not excessively severe or oppressive in restricting the employee's ability to find another job or make an income; Same standard as for-profit entities
- [See: Virginia Law on Non-Compete Agreements](#)



# ***Section 4 – Conclusion (Con't)***

- These topics are all very important, but you now have both the basics and key strategies for representing not-for-profit businesses for years and years to come.
- Final Plea - Please also consider serving on not-for-profit boards and recommending others to serve on not-for-profit boards or some other “advisory capacity” where you (they) are not representing the organization in a formal legal capacity.
- Reputations built over a lifetime can and will be destroyed in weeks of relentless pursuit by journalists, disaffected former or current employees, disgruntled board members, donors and others, seeking to tell the the truth about the organization
- Thank you for taking this course – tons of references to follow, I will just flip through them, but not discuss them

# ***Section 5 – References/Webliography***

- References and Resources Regarding Legal Issues for Not-for-Profit Businesses
- [https://law.lis.virginia.gov/search\\_cov/?query=charity](https://law.lis.virginia.gov/search_cov/?query=charity)
- <https://law.lis.virginia.gov/vacode/title57/chapter5/section57-57/>
- <https://www.vdacs.virginia.gov/food-charitable-solicitation.shtml>
- <https://law.lis.virginia.gov/admincode/title23/agency10/chapter210/section1070/>
- <https://www.councilofnonprofits.org/nonprofit-audit-guide/state-law-audit-requirements#VA>
- <http://www.dmlp.org/legal-guide/nonprofit-legal-assistance-organizations-virginia>
- <https://www.ericperkinslaw.com/ten-helpful-compliance-tips-for-virginia-nonprofit-organizations/>

# ***Section 5 – References (Con't)***

- <https://scc.virginia.gov/pages/Virginia-Nonstock-Corporations-FAQs>
- [https://www.vscpa.com/sites/default/files/resources/Responsibility2012\\_0.pdf](https://www.vscpa.com/sites/default/files/resources/Responsibility2012_0.pdf)
- <https://www.northwestregisteredagent.com/nonprofit/virginia/bylaws>
- [https://ballotpedia.org/Nonprofit regulation in Virginia](https://ballotpedia.org/Nonprofit_regulation_in_Virginia)
- <https://www.napalegalinstitute.org/tax-matrix/virginia>
- <https://independentsector.org/wp-content/uploads/2016/12/PrinciplesStateVirginia2016.pdf>
- <https://www.probonopartner.org/wp-content/uploads/2016/01/stateliabilitylawsforcharitiesandvolunteers.pdf>

# ***Section 5 – References (Con't)***

- <https://www.pldrlaw.com/virginia-personal-injury-and-accident-law/625-does-charitable-immunity-bar-all-personal-injury-claims-in-virginia.html>
- <https://www.law.virginia.edu/clinics/nonprofit-clinic>
- <https://www.americanbar.org/products/inv/book/304435821/>
- <https://www.venable.com/insights/publications/2011/02/the-top-10-legal-risks-facing-nonprofit-boards>
- <https://www.probonopartner.org/publications/legal-issues-new-nonprofits/>
- <https://nonprofithub.org/7-ethical-dilemmas-facing-nonprofit-organizations/>
- <https://hacklerflynnlaw.com/top-10-legal-risks-nonprofits/>
- [https://account.ache.org/iweb/upload/Gambescia\\_Chapter%207-e2d8d133.pdf](https://account.ache.org/iweb/upload/Gambescia_Chapter%207-e2d8d133.pdf)

# ***Section 5 – References (Con't)***

- <https://boardsource.org/resources/nonprofit-laws-and-regulations-faqs/>
- <https://inrc.law.uiowa.edu/nonprofit-law-practical-guide-legal-issues-nonprofit-organizations>
- <https://www.nolo.com/legal-encyclopedia/nonprofits-avoid-three-common-lawsuits-32392.html>
- [https://link.springer.com/referenceworkentry/10.1007/978-3-319-31816-5\\_3584-1](https://link.springer.com/referenceworkentry/10.1007/978-3-319-31816-5_3584-1)
- <https://www.hklaw.com/en/services/practices/private-wealth-services/nonprofit-and-taxexempt-organizations>
- <https://cullinanelaw.com/services/existing-nonprofits/>
- <https://www.legalzoom.com/articles/nonprofits>

# ***Section 5 – References (Con't)***

- <https://www.dcbar.org/pro-bono/free-legal-help/help-for-nonprofits>
- <https://pbpatl.org/wp-content/uploads/2014/06/CourseOutline.pdf>
- <https://www.boardeffect.com/blog/nonprofit-laws-checklist-for-board-members/>
- [https://ssir.org/articles/entry/ethics and nonprofits](https://ssir.org/articles/entry/ethics_and_nonprofits)
- <https://www.findlaw.com/smallbusiness/incorporation-and-legal-structures/non-profit-organizations.html>
- [https://www.law.nyu.edu › upload\\_documents](https://www.law.nyu.edu › upload_documents)

# ***Section 5 – References (Con't)***

- <https://www.philanthropy.com/article/va-court-rules-that-charities-can-be-sued-for-serious-errors/>
- <https://www.vacourts.gov/opinions/opnscvwp/1061496.pdf>
- <https://www.opengovva.org/foi-opinions/82ag429>
- <https://www.nolo.com/legal-encyclopedia/how-dissolve-nonprofit-corporation-virginia.html>
- <https://midkifflaw.com/2021/08/hoa-board-members-may-be-held-personally-liable-for-their-actions-on-behalf-of-the-hoa/>
- <https://www.venable.com/insights/publications/2011/02/the-top-10-legal-risks-facing-nonprofit-boards>

# ***Contact Information***

- Herb Rubenstein, JD, MPA, PGA
- [herb@herbrubenstein.com](mailto:herb@herbrubenstein.com) – Many free articles and videos at [www.herbrubenstein.com](http://www.herbrubenstein.com)
- 303.910.7961
- Other VACLE Courses:
  - Leadership and Ethics
  - Practical Advice: Basics of Forming and Advising Small Businesses
- Free e-book: Breakthrough, Inc.: High Growth Strategies for Entrepreneurial Organizations (Financial Times/Prentice Hall, 1998) Rubenstein and Grundy –  
<https://static1.squarespace.com/static/61cc64d04521f56f17d9a9bb/t/62cbff4d0690575463973af3/1657536334296/breakthroughPDF+-+no+graphics.pdf>