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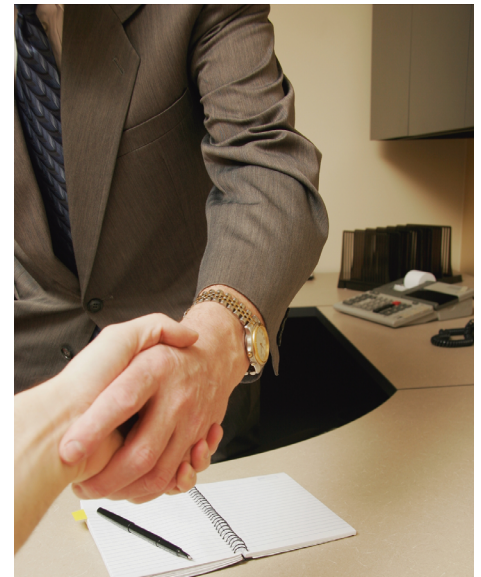
Happy Endings

By Melanie Lockwood Herman

As another calendar year draws to a close, the subject of “endings” comes to mind. Every day across the U.S., nonprofit leaders experience endings of one kind or another. The departure of a long-time employee, the retirement of a board member, and the decision of a small commercial vendor to narrow its scope of services are just a few examples of common endings. In our work with nonprofit organizations in this country and internationally, we have observed that nonprofit leaders often experience anxiety when the “end” is near. The purpose of this article is to offer practical advice about managing the risks associated with relationships that are fated to end.

Think Risk before You Begin

One of the most frequently omitted yet essential parts of a contract is the section indicating how each contracting party may escape from or terminate the arrangement. My own sense of why this omission is so common is that parties to a new contract tend to begin the relationship with an *unrealistic* sense of optimism. I invite you to reflect on the contracts you have signed during your career as a leader. How many times were you



certain or even concerned at the outset that the relationship was doomed? My guess is that the number is negligible.

Few leaders possess the skill of prophecy necessary to forecast *when* and *why* business relationships will end. When we hire new employees and contract with third parties we are confident that things will work out. Biases distort the decision making process, and the bias of overconfidence may be particularly harmful to sizing up the risk of business relationships. Professors Paul Schoemaker (University

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of Pennsylvania – Wharton School of Business) and J. Edward Russo (Cornell) label overconfidence “a hidden flaw in managerial decision making.”

The lesson from recognizing the overconfidence bias in our decisions about partners is to provide for failure while planning for success. For example, remember to include an escape clause in every contract. The language of the clause will differ based on the circumstances at hand. For example, it may be in your nonprofit’s best interests to ensure the ability to exit an arrangement without delay or complication. In that case, a clause permitting termination with 30 days written notice may be in order. Also consider any special requirements that may be necessary due to the nature of the contract, such as the requirement that the vendor work collaboratively with and willingly transfer computer program code, or other property of the nonprofit to the new provider.

Take Stock During the Journey

When I speak with nonprofit leaders who are reflecting on failed business relationships it’s not surprising to hear the sentiment: “there were signs all along.” Most failed relationships are preceded by signs that all is not well. Common signs include: missed deadlines, substitution of less experienced personnel, and inaccurate billing statements. In other cases areas of incompatibility become obvious and the prospect of a successful relationship grows dim. The mistake we too often make is to ignore the warning signs and hope that things will improve. A better approach to the “hope springs eternal” school of risk management is to take the following steps.

- First, bring the area or areas of concern to the attention of the contracting party;
- Next, engage in discussion about how to address the error, prevent its recurrence and get the relationship back on track; and
- Finally, set a timetable for fixing the mistake and ensuring the delivery of contracted services or materials is to your standards as specified in the contract. Provide a written confirmation of the steps that each party has agreed to take.

Wrap with Care

A popular retailer in my community offers year-round, complimentary wrapping of any gift purchased at the store. I find the option irresistible. No matter how long I labor over a package, it will never look as neat and attractive as the box wrapped by the store clerk in just a few minutes. Yet I will acknowledge that I could, if motivated, probably learn how to wrap effectively. Many nonprofit leaders seem similarly disinclined to learn how to wrap business relationships with care. The consequences of my stubbornness with gift wrapping are minor when compared to the potential risks associated with the mishandling of a failed partnership or business relationship. A simple reminder about “wrapping with care” can help you avoid the unnecessary exposure to legal claims, reputation risk and more.

Employees: Avoid the Bad Goodbye

The expression sometimes attributed to Socrates, “the only thing constant is change,” is an absolute truth with respect to the employees of a nonprofit. Over time, people come and go. Although most executives understand



this intuitively, a large number continue to be offended when a valued employee identifies a greener pasture. That offense translates into less than generous treatment of the departing employee. No employee wants to see a co-worker being treated badly. Watching how the leader reacts may have the unfortunate consequence of causing others in the workplace to vow not to provide the requested notice period.

Employees who announce their intent to leave should be treated kindly. Here are some important steps to avoid the risk of negative fallout:

- **Thank the employee** for their years (or months) of dedicated service. Be sincere. Be gracious.
- **Discuss with the employee when and how to notify staff and other stakeholders** (the board, volunteers, vendors with whom the employee works). Determine a mutually agreeable timetable and approach (e.g., an email to the staff that will be sent tomorrow morning), and reassure the employee about the tone of the announcement. Do not cause the employee a moment of anxiety about how the announcement will be worded. For example, “Why don’t I let the staff know that you’ve found a terrific new position closer to home and that while we will miss you, we are very happy that you have found something professionally rewarding that doesn’t require an exhausting commute to work. Would that be okay?” How about letting the employee write and make the announcement themselves when at all possible?
- **Discuss with the employee how their role may change during the period leading up to their final day on the job.** For example, instead of “business as usual,” it may be advisable to have the employee focus on training one or more co-workers and updating a procedures manual that relates to their area of responsibility. Thank the employee in advance for making a smooth transition possible.

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But My Lawyer Told Me...

1. NOT to tell a fired employee the specific reasons for her termination; and
2. NOT to allow an employee to remain in the office after he announces his resignation.

We consulted two experienced employment attorneys for their thoughts on the above topics.

Tell Me Why

According to Karla Grossenbacher, an attorney with the DC-office of Seyfarth Shaw, "If you don't provide some reason, the employee will assume an unlawful one. Also, employees who feel that they have been treated disrespectfully or unprofessionally at the time of their termination are the ones most likely to sue. Refusing to tell an employee why they are being fired may cause the employee to feel they are being treated unfairly." Grossenbacher adds that the employee who believes they have been mistreated is "more likely than not to consult a lawyer." Paul Siegel from Jackson Lewis LLP adds, "The actual reason should be stated—even in short form—or no reason should be given. In any event, a false reason should never be provided. Contradicting the real reason with the one stated in discharge (e.g., telling the employee they are being "laid off" when the real reason is poor performance) can give rise to an inference of discrimination, by creating an impression of pretext."

Should I Stay or Should I Go Now?

Experienced lawyers often disagree on the topic of whether a departing employee should be allowed to remain after giving notice of their intent to resign. Grossenbacher notes, "Immediately escorting people out who are resigning voluntarily is likely an overreaction absent some indication that the person has the ability or intent to damage the employer. It could be bad

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Employees who must be terminated for poor performance should also be treated kindly. Here are some important steps to minimize the risk that your decision to fire will cause a firestorm:

- **Thank the employee for their years (or months) of service.** Be sincere. Be gracious. During the conversation try to focus on the one (or more) good thing(s) the employee did, rather than the various unfortunate, costly, and unacceptable things the employee did or failed to do. It isn't necessary to reiterate the "one good thing," out loud, but keeping it top of mind will help you stay focused on the task at hand: a gracious goodbye.
- **Make certain that your files are clear and consistent about the legal reasons for the termination.** Documentation of performance counseling sessions, notes concerning the results of a formal performance review, and other material should be clear about why the employee's tenure came to an end. The Center recommends that terminated employees be told in plain terms the reasons for their termination. For example, "You are being terminated for failing to follow our security policy that strictly prohibits allowing persons without credentials into our safe house, despite repeated verbal and written warnings." The Center also recommends that a letter stating the reasons for departure be provided. A number of states have adopted service letter laws which require, under certain circumstances, that the reason for termination be provided to a terminated employee. For

example, the law in Maine requires that employers, within 15 days of receipt of a written request, give the employee a written statement containing the reasons for termination of employment. Washington State's law is similar, but shortens the time limit for compliance to 10 days.

- **Consider ways to make the employee's departure as pleasant and stress-free as possible.** No one wants to be fired. Inability to perform assigned duties or follow your rules does not render an employee ineligible for compassionate treatment. Treating a terminated employee harshly will only reflect badly on you. Make certain you do nothing to cause the employee undue embarrassment about their circumstances, and refrain from any steps that are likely to cause unnecessary anger.

With respect to any departing employee, make certain you *follow your written personnel policies* closely. Always *obtain an independent review of your planned approach to terminating an employee for cause*. The independent review might be provided by an employment attorney licensed to practice in your state or a consultant at a firm with HR expertise. Finally, arrange for an *exit interview* with every departing employee. The interview should be conducted by a senior professional who is not the employee's direct supervisor. It can be conducted in person or by telephone.

Long-Time Business Partners

Your nonprofit's needs for business partners will change over time. The IT
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guru who works from her basement may not be equipped to manage your growing network with dozens of users. The public relations firm that has developed one-color print ads for your nonprofit may not be able to provide the candid, state-of-the-art advice you need regarding a proposed multi-media campaign. In every organizational lifetime the partners with which we do business change. Consider the following tips to ensure a smooth transition from one provider to the next:

- **Always inform business partners or vendors of the reasons for your decision to terminate the relationship.** Be candid and clear.
- **Ask the vendor for their help during the transition to a new provider.** Make clear your need for assistance and request a commitment to help ensure a smooth transition.
- **Follow the required notice provisions of your contract with the vendor.** Following the notice requirements is not only a way to potentially eliminate the risk of a breach of contract claim, it's the right thing to do.
- **Invite the business partner or vendor to provide feedback** on their experience working with your nonprofit, including positive and negative aspects. Don't be defensive if the vendor shares his or her frustration working with your staff. Listen carefully and try to learn.
- If appropriate, indicate **whether you would be willing to serve as a reference** for the vendor.

Board Members

Board transitions are a good thing. New members breathe life into age-old policies and bring new ideas to

the table. Veteran board members provide perspective on the history and accomplishments of the nonprofit and help balance the sometimes intoxicating lure of rapid change. The reasons for board departures are as varied as the people who serve on your board. Some may depart when their term draws to a close, while others will plead to be let off due to busy schedules or resign in a huff to protest a policy decision with which they disagree. In rare cases a board member may be voted off for conduct unbecoming a trustee. No matter the reason for the departure, when it's time to say "goodbye" to a board member, remember to:

- **Graciously thank the board member for their service** and do so in the most public way possible. For some nonprofits a professional conference may provide the best platform for a public thanks. For other nonprofits expressing thanks at a fundraising event, board meeting or featuring a prominent note of thanks in the newsletter will suffice.
- **Arrange an exit interview with the CEO, Executive Director or chief staff professional.** Fundraising consultant Carol Weisman writes that "Whatever the reaction and whether the departure is because of the end of a term or because of personal or business reasons, the executive has an opportunity to learn and grow professionally as well as ensure future positive involvement with the departing board member by asking for a final meeting." Carol suggests that the following questions be included during board member exit interviews:
 - ❑ Did we use your talents effectively?

for morale if the departing employee's coworkers see such a reaction, and it is likely a jury would see this as unfair treatment." She cautions that if the employee has made threats against the employer a different approach is in order and advises nonprofit leaders to take steps to prevent the employee from causing harm.

Lawyers who counsel nonprofits are more likely to agree about whether an employee who has been fired should be given the option of staying to assist with the transition period. Siegel advises that "Once someone is discharged, it is far better to have them leave the premises to avoid questionable workers' compensation claims, theft or destruction of corporate property, and disrupting others." Grossenbacher agrees with this approach for an employee who is terminated for misconduct or poor performance.

The bottom line for every nonprofit employer is that you need to decide how you will approach the "end of the line" with your employees. Start by finding out what your trusted legal advisor recommends (and why), and develop a practice that suits the culture and circumstances of your organization. As with any policy or practice, consider how your approach will be perceived, as well as the risks associated with various strategies.

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- If I can call you in the future, what issue should I consult you about?
- What did you enjoy about your time on the board?
- What would have made it better?
- How can I improve as a leader?

The Clint Black song “A Bad Goodbye” offers a musical reminder that goodbye is “easier said than done.” Nonprofit leaders committed to managing the inevitable risks in relationships should exercise care when forming and ending business relationships. Your mission is too important and a “bad goodbye” is in most cases, avoidable. Armed with awareness of the overconfidence bias

and a commitment to step carefully and with grace when it’s time to call it quits, you will be able to orchestrate the ending of any business relationship with minimal legal and reputation risk.

Melanie Lockwood Herman is Executive Director of the Nonprofit Risk Management Center. She welcomes your feedback on this article and questions about the Center’s resources for nonprofit leaders. She can be reached at Melanie@nonprofitrisk.org.

Melanie’s most recent books include *EXPOSED: A Legal Field Guide for Nonprofit Executives*, which includes chapters on contracting risks, employment liability, and legal issues and the nonprofit board. Information on this book and other recently released publications can be found at: www.nonprofitrisk.org/store/hot.asp



Winding Down: A Risk Management Checklist

The Nonprofit Risk Management Center has developed a ten-page narrative and “checklist” for leaders in the process of winding down their nonprofit organizations. This free resource offers an overview of the process of dissolution (which is an action governed by state law), as well as a list of issues that CEOs and board leaders should consider when planning to wrap up the operations of a nonprofit. The complete resource is available here www.nonprofitrisk.org/library/fact-sheets/Checklist_for_Winding_Down.pdf.

One of the topics covered in the checklist is the subject of governance. There is likely to be great angst among board members who want to support the organization at this critical time, and loyal members may also express anger that the organization is closing its doors.

- Some may have been present at the organization’s founding or be so closely aligned with the organization that they believe their own reputation is inextricably linked to the nonprofit’s and that dissolution equates to failure.
- It is especially important for board members to remember their duty of loyalty to the organization and to make decisions that are *in the best interests of the organization*.
- By the time the decision to close the nonprofit’s doors is made, several board members may have resigned.
- State law determines the minimum number of board members for a nonprofit organization (it is generally two or three; a small minority of states permit single member nonprofit boards).
- Be mindful of the minimum number of board members required. If appropriate, and at the appropriate time, all board members *except the minimum number* may resign during the winding down period.
- It is a violation of a board member’s legal duty of care to the nonprofit to resign if his/her resignation would leave fewer than the minimum number of board members in place.
- Determining *who* stays and *who* leaves is an important decision for the nonprofit during this sensitive period.
- Those remaining will have to ensure that all required filings are completed with the state and the IRS, and that correspondence with stakeholders, insurance carriers, and possibly vendors is handled professionally.
- The winding down process may require several months. Those who remain may be involved in the nonprofit’s closure off and on for several months after the nonprofit ceases day-to-day operations.