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Don't Blow It: 10 Lessons From 10 Years of Nonprofit Whistleblower Policies

By Thomas W. Simcoe and Delaney M. R. Knapp
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Since the enactment of the Nonprofit Revitalization Act in 2013 (the "NPRA"), most New York nonprofits have been subject to a requirement that they adopt whistleblower policies. This requirement was expanded in both its reach and substance in January 2022, when additional protections affecting all employers were layered onto the existing ones affecting nonprofits. Having now had a decade plus of experience in drafting and administering nonprofit whistleblower policies, we thought it would be a good time to share some of our lessons learned.

These lessons broadly branch out from two central themes. The first is that whistleblower policies obey the "*law of unintended consequences*," which dictates that any law or regulation intended to cause one specific consequence will in practice cause many, some of which will be perverse when considering the original intended goals.

The intended consequences of whistleblower protections laws are, of course, that employees are empowered to report wrongdoing without fear of retaliation, protecting both individual employees and the public's interest in having nonprofits run with integrity. Whistleblower policies, properly administered, can indeed be very effective at this.

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The unintended consequences? The creation of leverage for terminated employees to stall termination or enhance their severance, regardless of whether they are being terminated for good (or even great) cause. The simple fact is that almost every terminated employee can get some degree of leverage by asserting some-

thing bearing the hallmarks of a whistleblower report. Indeed, some plaintiff's lawyers actively encourage it.

Not only do terminated employees often wrap themselves in whistleblower status to make their firing more difficult (and expensive), but they often also look to manipulate the review process that making a report triggers. In our experience, this can be done both to settle personal scores as well as to create inferences of bad faith and misconduct related to administering the whistleblower policy itself.

The good news is that by adopting and following well-crafted whistleblower policies, organizations can position themselves well, maximizing the ability of their policies to serve their intended goal—encouraging reports of wrongdoing and establishing pathways to investigate and take action when appropriate—while reducing the chances that the policies get exploited for unintended purposes.

Lesson 1: If Your Organization Doesn't Have a Policy, Get One Immediately. At this point, every nonprofit with even one employee should have one. A nonprofit's failure to have a policy at all is the lowest possible hanging fruit for an employee trying to establish that your organization is being run in bad faith or without adequate compliance safeguards.

Lesson 2: Make Sure Your Policy Is a Good One. Notwithstanding Lesson 1, a bad policy can in some cases actually be worse than not having one at all. How do you know if you have a bad policy? Review your organization's policy and ask yourself these questions:

· **Can (or would) we actually follow it?** In every detail? For example, does the policy commit to absolute anonymity for reporting individuals, or does it acknowledge that the organization will need to carry out a complete and thorough investigation and cannot commit to anonymity in all cases if the nature of the investigation will not allow it?

Does every whistleblower report have to be reviewed by the board just because the report styles itself as a whistleblower report, regardless of whether the substance is more appropriately addressed at a much lower level on the "org" chart (i.e., by a lower level supervisor or manager)?

This question is critical, because failing to follow your own policy is an easy avenue for attacking the integrity of your organization's handling of whistleblower reports. It won't matter if you had good reasons for deviating from your policy, you'll still be on the defensive.

· **Is the language appropriately neutral and balanced?** For example, does it refer to a whistleblower "report" (as we do throughout this article), or to a "compliant"? The latter term evokes an aura of presumptive validity that may not be warranted. Does it describe the response to a report as an "investigation" in all cases, or does it allow for "investigations" among other kinds of responses (e.g., a more neutral sounding "review")? Does it include a statement that reports made in bad faith are subject to discipline (including termination)?

· **Does the policy strike the right balance regarding communications and transparency?** Does the policy require that leadership give information or updates to the reporting individual? In many cases this would be legally inappropriate. Yet a reporting individual can nonetheless portray your organization in a negative light if it fails to provide updates

and findings that your policy says would be provided.

Lesson 3: Follow the Policy. Every Time. Consider the possibility that any reports from employees that relate to carrying out organizational policies or practices may implicate your organization's whistleblower policy or the law, even if they don't look like formal whistleblower reports. Review your policy carefully and make sure you follow its requirements, beginning from the moment a report is received.

Lesson 4: **Follow the Policy. Wherever It Leads You.** This shouldn't need stating, but it does, particularly where whistleblower reports involve the most senior leadership or even board members.

This leads us directly into our second "lessons learned" theme, a scenario we sometimes think of as "*boards behaving badly*." These are situations where board members have made inappropriate comments, sometimes directed at or within earshot of employees, in board or committee meetings, holiday parties, or during other functions. Often nonprofits come to us because they think they are dealing with a thorny governance issue (can we discipline a volunteer board member, how do we deal with an employee's discomfort about presenting to a board committee because of this uncomfortable conversation that happened?), but it hasn't occurred to them that they may be dealing with a whistleblower report.

Lesson 5: Any Report About a Board Member Is a Potential Whistleblower Report. These situations almost always involve a report of conduct that could be in violation of employment law (e.g., board member comments can create a hostile environment) and or/or involve a breach of fiduciary duty—because any action by a board member that creates risk of a lawsuit is likely a breach of the duty of care at the very least—and as such requires board action.

Lesson 6: Make Sure That Codes of Conduct That Apply to Your Employees Also Apply to Volunteers, Especially Board Members. A breach of a board member's fiduciary duties is sufficient grounds for a board to take action (e.g., removing a board member for cause) in the event of board member misconduct. Fiduciary duties require the highest level of conduct, and thus they should be viewed as imposing higher standards than any code of conduct that applies to an organization's "rank and file" employees. However, in such circumstances, it is also very helpful to have a code of conduct that explicitly applies to board members, as it can eliminate any need to discuss exactly what standards apply.

Lesson 6.b: See Rule 3! Especially where a board member is involved, make sure you follow your whistleblower policy.

Lesson 7: Make Use of Executive Session. The term "executive session" is commonly used to describe the part of a board meeting (or, less commonly, a whole meeting) where all persons that are not board members are dismissed from the meeting. Because nonprofits and their stakeholders value transparency, "executive session" is generally used sparingly, but it can be good practice to have some portion of regular meetings be in executive session.

However, it is essential to go into executive session when whistleblower reports and their investigations are discussed, in order to maintain confidentiality and, in many cases, attorney-client privilege (if counsel is present

and providing legal advice) should litigation develop in the future. Technically, nothing particular is needed for most New York nonprofits to go into executive session, because no one other than board members has the right to attend such meetings. (Note that nonprofits which are subject to New York's open meetings law requirements are the major exception here, and are beyond the scope of this article). However, it is best practice to formally begin and end executive session by resolution and to reflect doing so in the minutes.

Lesson 8: Make Use of Attorney-Client Privilege. Not just with respect to advice given by counsel in board meetings, as alluded to above, but also for all communications via email and any other written correspondence related to the report and any related review.

Lesson 9: Keep Meetings Scripted. This goes for board meetings as well as interactions with reporting individuals and interviews with employees and others with factual information. Having a "script" here means thinking ahead to the ultimate resolution of the review and ensuring that you will have said and done everything that you will want to be able to say you have said and done when all is resolved.

It means having a carefully developed plan which ensures that the policy is being carried out, both as to the letter and the spirit, that information being received or gathered (and related questions) is comprehensive and appropriately calibrated, and that all legal and practical considerations are thoroughly thought through in advance, to the extent possible. It is far too easy for meetings to veer off topic or into problematic areas when you have not established the script in advance.

Lesson 10: Keep the Minutes Tight. Legally, the only thing minutes must do is document the actions of the board (as well the procedures necessary for their validity). While minutes typically serve much broader purposes than this, even at their most expansive minutes should never be a verbatim record of every comment every attending board member or guest makes. This is most critical where future litigation is possible, because in litigation, minutes can be offered as *per se* evidence of whatever happened at a given board meeting. This means that they can be offered as affirmative proof of whatever they contain.

And even if they aren't definitive proof, they can be damning nonetheless. For example, if the minutes reflect a comment from board member X that "we never removed a director for making misogynistic comments before, it's not fair to remove Mr. Y now without a warning," that can be admitted into evidence—even if board member X's statement itself was 100% wrong as a factual matter. So keep the minutes tight, only include what is necessary to carrying out the whistleblower policy, and deal with the matter at hand.

Thomas W. Simcoe *is a member and co-chair of exempt organizations at Bond, Schoeneck & King*. **Delaney M. R. Knapp** *is an associate at the firm.*