

I. INCORPORATION PROCESS (OUTLINE)
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INCORPORATION PROCESS

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I. Introduction

Attorneys are blessed with the opportunity to counsel nonprofit clients, whether starting a small nonprofit to honor a family member's legacy or helping guide and steward a venerable national institution through the deep oceans of legal and tax compliance. Attorneys advising tax exempt organizations should consult various sources.² A tax exempt organization is a corporation, trust, or other entity and can come in many flavors: they are usually charitable organizations, but can have other nonprofit purposes.³ Tax exempt organizations (1) do not pay federal income tax to the Internal Revenue Service (IRS) or many state taxes and (2) may provide tax deductions to donors for their donations.⁴ Under the charitable organization umbrella are charitable, educational, scientific, and religious entities, public charities and private foundations, or other nonprofit purposes.⁵

Americans have a rich and storied history of philanthropic, educational, religious, and charitable, and other nonprofit endeavors. Tax exempt status for charitable organizations

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² See Bruce R. Hopkins, The Law of Tax-Exempt Organizations (Wiley, 10th ed., 2011 and 2013 Supp.) and Legal Responsibilities of Nonprofit Boards (2nd ed. 2009); see Marilyn E. Phelan, Representing Nonprofit Organizations (West, 2011) ("Nonprofit Organizations") and Nonprofit Organizations: Law and Taxation (West, 2013) ("Nonprofit Law"); see Lesley Rosenthal, Good Counsel: Meeting the Legal Needs of Nonprofits (Wiley, 2012) and the IRS website (www.irs.gov) and publications. For Kansas nonprofits, see K.S.A. Ch. 17; see Jack M. Epps, Kansas Corporate Practice and Forms (2007 ed.); and see Alson R. Martin ed., Kansas Corporation Law & Practice (KBA, 5th ed., 2011). For Missouri nonprofits, V.A.M.S. §355.001 et seq. ("Missouri Nonprofit Corporation Act"); see Thomas W. Van Dyke and Marc D. Stone, Missouri Corporate Practice and Forms (2010 ed.); see Eric Ziegenhorn and M. Elizabeth Fast, Missouri Practice Vol. 7A (3rd ed., West, 2003), Ch.48; Philip G. Louis, Jr., Missouri Practice, Vol. 25 (2nd ed., West, 2000), §1.9, and Vol. 26 (2nd ed., West, 2000), Ch. 35.

³ See Hopkins, Tax-Exempt Organizations, Chs. 6-12 (charitable), and Chs. 13-19 (other nonprofits).

⁴ See Martin, Kansas Corporation Law, §12.6.3.

⁵ See Hopkins, Tax-Exempt Organizations, Chs. 7 (charitable), 8 (educational), 9, Ch. 10 (religious), 12 (private foundations), and Ch. 11 (other nonprofit purposes); see Rosenthal, Good Counsel, 4-6; see Martin, Kansas Corporation Law, §12.6.2; see Phelan, Nonprofit Law, §16:19 (Kansas church incorporation requirements); see V.A.M.S. §355.025.

was first enacted in 1894 and recognized constitutionally in 1913 when the U.S. income tax was ratified.⁶ Kansas and Missouri have long recognized tax exempt organizations.⁷ America leads the world in philanthropic generosity, and in 2009, Americans donated more than \$300 billion to nonprofit organizations.⁸ Nonprofits employ some 10 million Americans and account for about \$1.4 trillion in annual revenues and expenditures.⁹ As attorneys, we want to provide the best corporate governance counsel and tax advice to nonprofits, and we will likely be actively involved in starting, guiding, or participating in and donating to these organizations.

II. Liability Associated with Unincorporated Organizations

Corporate attorneys should counsel clients to see an organization's beginning and its end, to examine each distinctive point on the visionary arc of the organization's lifetime.¹⁰ Why would a tax exempt organization incorporate? Like a general partnership, unincorporated organizations have two levels of liability. First, at the organizational level, an organization's creditors can levy, attach, claim, or sue upon an individual's assets. Second, at the individual level, a person can be liable for torts or contracts of another individual within the organization. Incorporation covers these vulnerabilities with a corporate veil over the individual's assets, shielding them from an organization's creditors, and from liability for other individuals' actions. Benefits of incorporation include separate corporate existence, limited liability, the business judgment rule's protection, potential credit score and bankruptcy protection, intellectual

⁶ See Hopkins, Tax-Exempt Organizations, §2.4, at 35-39.

⁷ Missouri recognizes nonprofit corporations, V.A.M.S. §355.001 et seq., and pro forma or benevolent associations, V.A.M.S. §352.010 et seq. See Louis, Missouri Practice, §35.1, 162. Missouri pro forma associations used to be incorporated by the circuit court – e.g. City Union Mission (formed August 7, 1924) and The University of Kansas City (formed May 13, 1881) - but pro forma associations are historical and less advantageous than a Missouri nonprofit corporation, as pro forma association members “might be subject to personal liability that would not exist” in a nonprofit corporation. See Louis, Missouri Practice, §35.1, 163.

⁸ See Linda Crompton, BoardSource presentation to Kansas Conference on Poverty, “Transformation in the Social Sector: The Role of the Board,” July 2011, Slide 4.

⁹ See Rosenthal, Good Counsel, xix.

¹⁰ Celebrated poet and Nobel laureate T.S. Eliot (1888-1965) memorably evoked this idea: “What we call the beginning is often the end/And to make an end is to make a beginning/The end is where we start from.” T.S. Eliot, *The Four Quartets*, “Little Gidding,” (No. 4), V.

property ownership, perpetual life, and the ability to adapt to a changing mission over time.¹¹

Incorporating a nonprofit shields the organization's participants from the litigious aftermath of an unforeseen catastrophe. Pulitzer Prize-winning historian David McCullough tells the story of the fearsome Johnstown Flood of May 30, 1889 in Pennsylvania, which left 2,209 people dead and a town destroyed, and the savvy nonprofit planning that saved eminent businessmen like Andrew Carnegie, Henry Clay Frick, and Andrew Mellon from the brink of financial ruin.¹² A *force majeure* like the Johnstown Flood can become any client's worst nightmare, but proper legal planning can help clients weather their darkest hours.¹³

Tax Exempt Status

Tax exempt law is premised on nonprofit corporations, but trusts and unincorporated associations can also qualify for tax exempt status.¹⁴ As Lesley Rosenthal, counselor to the Lincoln Center for the Performing Arts, put it, "nonprofits are of critical importance, providing nothing less than the foundation and fabric of a good [and] decent ... society."¹⁵ Because of the nonprofit corporation's corporate veil protection and the extensive statutes, case law, and regulations based on nonprofit corporations, more precedent exist to seek tax exempt status as a nonprofit corporation vis-à-vis an unincorporated nonprofit organization. Practitioners focus on obtaining the IRS' official recognition that an organization is tax exempt and that its operations will follow applicable federal law and IRS regulations to maintain tax exempt status and, in the case of a 501(c)(3) organization, to afford individual and corporate donors charitable tax

¹¹ See Rosenthal, Good Counsel, 20-21; K.S.A. §17-6002(b)(6), see Martin, Kansas Corporation Law, §12.1.3.

¹² See David McCullough, The Johnstown Flood (Simon & Schuster, 2nd ed. 1987). The flood began when heavy rains breached an earthen dam at the South Fork Fishing and Hunting Club, on a mountain lake shore 65 miles east of Pittsburgh in western Pennsylvania. Chartered on November 15, 1879, the Club was "the most exclusive resort in America." Id., 249. The Club's nonprofit incorporation allowed its members to weather a blizzard of lawsuits, protected its members with limited liability from the flood's devastating aftermath, although many Club members donated generously to relief efforts. Id., 254-258.

¹³ See Rosenthal, Good Counsel, 72.

¹⁴ See Martin, Kansas Corporation Law, §12.1.4; see Louis, Missouri Practice, §35.4, at 168-171.

¹⁵ See Rosenthal, Good Counsel, 10-11.

treatment for donations to the tax exempt organization.¹⁶ An individual or corporate donor may generously donate monies to various worthy causes, but if the recipient lacks the IRS tax exempt imprimatur, the donor will not receive any tax benefits or deductions for their generosity, and the recipient may realize taxable income or incur gift tax liability.¹⁷

The tax exempt organization universe is a complex mix of corporate and tax law. Corporate law statutes are like planets, while tax law specifies various celestial orbits and trajectories to be navigated. 501(c)(3) charitable organizations afford donors tax deductible contributions but are bound by stricter rules, while the IRS Code recognizes dozens of other non-501(c)(3) organization types which have more flexibility but donors' contributions may not be tax deductible (as they are not charitable organizations), but the organizations are tax exempt.¹⁸ To qualify for tax exempt status, certain legal formalities – including organizing documents, governing rules, and regularly chosen officers or leaders – must be followed.¹⁹

Tax exempt status contains two layers: federal and state. For the first layer, the IRS grants federal tax exemptions for organizations engaged in charitable, educational, scientific, religious, or other similar activities and causes.²⁰ To obtain a tax exemption letter for a nonprofit client, the attorney files IRS Form 1023 requesting 501(c)(3) tax exempt status.²¹ The IRS applies the operational test - does the organization operate in a charitable or nonprofit way? - to determine whether an organization should be tax exempt.²² To keep federal tax exempt status, the nonprofit must make required public disclosures, avoid private inurement, and limit private benefit transactions.²³ As a second

¹⁶ See Hopkins, Tax-Exempt Organizations, §3.3, at 47-55. See Phelan, Nonprofit Organizations, §1:3. See Rosenthal, Good Counsel, 28.

¹⁷ See Hopkins, Tax-Exempt Organizations, §2.3, at 32-39, §4.1(a), at 59-62.

¹⁸ See Steven D. Simpson, Tax Compliance for Tax Exempt Organizations (CCH, 2007), §3.01, at 93; see e.g. IRS Publication 557 and Form 1023.

¹⁹ See Hopkins, Tax-Exempt Organizations, §4.1(a), at 61.

²⁰ I.R.C. § 501(a) and (c)(3); see also IRS Publication 557; see Phelan, Nonprofit Organizations, Ch. 2.

²¹ See Martin, Kansas Corporation Law, §12.6.6; see Rosenthal, Good Counsel, 29, 44-45.

²² See Hopkins, Tax-Exempt Organizations, §4.5, at 77-83, and 2012 Supp., at 12-13.

²³ See Rosenthal, Good Counsel, 31-34.

layer, states also offer tax exempt status.²⁴ Kansas grants some corporations nonprofit status in its state income tax and real and personal property tax laws.²⁵ Like Kansas, Missouri law mirrors federal income tax law for nonprofit corporations and has similar nonprofit status provisions for state income taxes, sales and use taxes, and real property taxes.²⁶

Most tax exempt organizations should incorporate. How does the incorporation process work for a nonprofit vis-à-vis a for-profit corporation? Nonprofit corporations have articles of incorporation, Bylaws, and mission statements, while for profit corporations require articles of incorporation and Bylaws.

Naming a Nonprofit Organization

A name is a shining beacon, broadcasting an individual or organization's character, quality, and reputation to the world. Names can conjure up pleasant memories or repulsive sentiments of days gone by, communicate strength or weakness, fidelity or incompetence. Checking for name availability is the first nonprofit incorporation step.²⁷ The Kansas Secretary of State's website has a name and registered agent database for all Kansas nonprofits.²⁸ A name is registered with the Secretary of State's office by filing the required paperwork (or filing electronically), or a name may be reserved for a small fee for some time.²⁹ Beyond the state level, the nonprofit corporate counsel should check if (1) a proposed name is already protected by federal trademark law, and (2) the domain name is available for the nonprofit's website.³⁰

²⁴ See Rosenthal, Good Counsel, 30-31.

²⁵ K.S.A. §79-32,113; K.S.A. §79-201 et seq. See Epps, Kansas Corporate Practice, §18-4; see Martin, Kansas Corporation Law, §12.6.

²⁶ See Louis, Missouri Practice, §35.4, 170; see V.A.M.S. §§143.321, 143.441.2 (state income taxes); see Van Dyke, Missouri Corporate Practice, §18-6; see V.A.M.S. §144.030.2 (sales and use taxes); see Van Dyke, Missouri Corporate Practice, §18-6; see Mo. Const., Art. X, §6 (real property taxes); V.A.M.S. §137.100(5); see Van Dyke, Missouri Corporate Practice, §18-8.

²⁷ See Martin, Kansas Corporation Law, §12.2.1.

²⁸ See Kansas Charity Check website (www.kscharitycheck.org).

²⁹ See Kansas Secretary of State's website (www.accesskansas.org/businesscenter/index.html?link=name-res) (Kansas charges a \$30 fee and allows a 120 day name reservation) and Missouri Secretary of State's website (sos.mo.gov/business/faqs.asp) (Missouri allows a 180 day name reservation).

³⁰ The U.S. Patent and Trademark Office's website (www.uspto.gov) provides trademark and other searches under the Trademark Search link. Kansas has a trademark search at

Patents, copyrights, and trademarks are creatures of federal law.³¹ Organizational names cannot be patented or copyrighted, but a proposed name may be trademarked as used in context and continuously in the stream of commerce, and protected by federal law from use by another organization.³² A proposed logo or slogan or similar organizational expression may be subject to trademark, trade dress, service mark, or otherwise protected.³³ Avoid choosing a name closely associated with a well known organization or prominent company or family name – e.g. Red Cross USA, the Facebook Group LLC, the Rockefeller Foundation, or the Wounded Warrior Foundation Inc. – as it may lead to litigation.³⁴ If the nonprofit organization will operate internationally, a trademark can be registered internationally under the Madrid Protocol and published in the WIPO Gazette of International Marks.³⁵ “Googling” a name is advisable, and a website domain name may be reserved for a small fee.³⁶

Intellectual property (IP) law is a complex, specialized, and rapidly changing field. Federal law provides various remedies and penalties for patent, copyright, or trademark infringement, and different IP owners enforce their intellectual property portfolios with widely varying vigor. If a nonprofit client has a lurking issue with a proposed name, logo, or content in this potential liability minefield, the nonprofit counsel should consult an experienced intellectual property lawyer to handle the client’s IP portfolio.

www.kssos.org/business/trademark/trademark_search.aspx. Missouri has information at www.sos.mo.gov/business/trademark.asp. See Rosenthal, *Good Counsel*, 22, Ch.8.

³¹ See Rosenthal, *Good Counsel*, 81-88 (IP law), 91 (copyright administration checklist), 185-221 (trademarks and nonprofit marketing); see also Kinney & Lange, P.A., *Intellectual Property for Business Lawyers* (West, 2012); Lawrence M. Sung & Jeff E. Schwartz, *Patent Law Handbook* (West, 2012); Paul Goldstein, *Goldstein on Copyright* (Aspen, 3rd ed. 2012); William F. Patry, *Patry on Copyright* (West, 2013); Bruce P. Keller & Jeffery P. Cunard, *Copyright Law: A Practitioner’s Guide* (PLI, 5th ed. 2012); James E. Hawes and Bernard C. Dietz, *Copyright Registration Practice* (West, 2nd ed. 2013); Siegrun D. Kane, *Kane on Trademark Law: A Practitioner’s Guide* (5th ed.) (PLI, 2012).

³² See Rosenthal, *Good Counsel*, 220-221; see Hopkins, *Tax-Exempt Organizations* (9th ed., 2007), § 4.8, at 96-97.

³³ See Kinney & Lange, *Intellectual Property*, Ch. 8.

³⁴ See Epps, *Kansas Corporate Practice*, §5-4A.

³⁵ See Kinney & Lange, *Intellectual Property*, § 9:11.

³⁶ www.google.com.

Shifting gears to state corporate law dynamics, proper incorporation and compliance is vital for every nonprofit organization.³⁷ As counsel to a nonprofit client, the lawyer should maintain a copy of various key documents: articles of incorporation, mission statement, by laws, resolutions, minutes and board meeting records, tax filings, annual reports, government records, and other relevant legal documents (leases and property deeds, intellectual property documents, policies and procedures, and insurance policies).³⁸ Throughout the nonprofit lifecycle, an attorney should ask various questions and obtain documents. The attorney needs the articles of incorporation and by laws as well as the IRS tax exemption letter. The attorney should use a checklist or work plan to (1) familiarize himself with the organization’s mission, programs, and activities; (2) explore who the donors are and their interests in the organization; (3) develop a legal history or timeline of the organization; (4) examine whether new board members receive training or materials; (5) look at interactions with government regulators; (6) ask whether major leadership or governance changes are on the horizon; (7) inquire of the organization’s expectations of the lawyer; (8) dialogue about the organization’s goals, visions, and desired outcomes; and (9) develop a detailed list of what legal work needs to be done and proactively communicate and work with the organization to accomplish the work.³⁹ Checklists are helpful tools to guide nonprofit counsel through the incorporation process, before we hone in on Kansas and Missouri’s nonprofit incorporation procedures.

Practice Pointer – Nonprofit filing checklist⁴⁰

- Incorporator’s Name and Mailing Address⁴¹
- Corporate Name⁴²
 - Check Corporate Name Availability
 - State/federal trademark searches

³⁷ See Rosenthal, Good Counsel, 27, 44-45 (compliance checklists).

³⁸ See Rosenthal, Good Counsel, 24, 257-269.

³⁹ See Good Counsel, 15-17 (“Chapter 1 Work Plan”).

⁴⁰ See Epps, Kansas Corporate Practice, Form 5-5.

⁴¹ Any “authorized officer” may execute and file documents for the nonprofit. K.S.A. §17-6003(a)(1) (West 2013 Supp.); see William Quick, “The New Corporate Landscape: 2004 Kansas General Corporation Code,” 73-Aug J.K.B.A. 30, 32 (“Quick”); K.S.A. §17-6002(a)(5).

⁴² K.S.A. §17-7504(a)(1).

- Reserve Corporate Name (optional)
 - Protect Corporate Name (optional)
- Registered Office and Registered Agent⁴³
- Order Minute Book and Corporate Seal⁴⁴
- Draft contracts and policies for adoption by Board⁴⁵
- Tax exempt application/regulatory matters
- Federal Tax Identification Number Application⁴⁶
- Incorporator's Consent to Initial Board of Directors⁴⁷
- 1st Consent of Directors
- Board of Director's 1st Meeting⁴⁸
 - Agenda
 - Elect Officers
 - Adopt Bylaws
 - Approve bank account(s)
 - Ratify contracts and other drafted policies
 - Meeting Minutes⁴⁹
- Officers and governing body members⁵⁰
- Membership or capital stock shares issued, if any⁵¹
- Subsidiary business owner?⁵²

Kansas filing

Kansas accepts paper and electronic filing of various incorporation documents.⁵³ A Kansas charitable organization also files solicitation forms.⁵⁴ A Kansas nonprofit

⁴³ K.S.A. §17-6201 (registered office); K.S.A. 15-7504(a)(2) (principal office location); K.S.A. §17-6202.

⁴⁴ K.S.A. §17-6514 (minute book); K.S.A. §17-6102(3) (corporate seal).

⁴⁵ See Rosenthal, Good Counsel, Chs. 3-9, 11.

⁴⁶ See IRS website.

⁴⁷ K.S.A. §17-6007 (incorporator's consent); K.S.A. §17-6301; see Martin, Kansas Corporation Law, §12.2.5.

⁴⁸ See Martin, Kansas Corporation Law, §12.2.6.

⁴⁹ See Exhibit C for sample Board of Directors meeting minutes. See Martin, Kansas Corporation Law, §12.2.5 (provide for members' rights of notice in bylaws).

⁵⁰ K.S.A. §17-7504(a)(3).

⁵¹ K.S.A. §§17-7504(a)(4) and 17-6002(a)(4); see Martin, Kansas Corporation Law, §12.1.2(b).

⁵² K.S.A. §17-7504(a)(5).

corporation must file different forms.⁵⁵ The nonprofit corporation files an original and one copy of the articles of incorporation along with the filing fee.⁵⁶ The nonprofit corporation must file an annual report at the end of its tax year and a \$40 fee, change of registered office and/or agent and a \$20 fee, and other standard forms with the Kansas Secretary of State, just as a for profit corporation would.⁵⁷

Missouri filing

Missouri follows a similar procedure to Kansas for incorporating nonprofit organizations.⁵⁸ Missouri nonprofit corporations must file paperwork and cannot file electronically.⁵⁹ Nonprofit corporations conducting business in Missouri must be designated as “public benefit” or “mutual benefit” corporations.⁶⁰ A Missouri nonprofit corporation must declare itself a public benefit corporation or a mutual benefit corporation in the articles of incorporation.⁶¹ Public benefit corporations encompass several statutory categories, including religious or IRS Code §501(c)(3) purposes, and are formed for the public good or to serve charitable goals, while mutual benefit corporations are the residual catch-all category and are focused on providing benefits to members, like a neighborhood association or social club.⁶² A mutual benefit corporation’s membership

⁵³ The Kansas Secretary of State’s website has efilings details.

http://www.kssos.org/forms/forms_results.asp?division=BS.

⁵⁴ K.S.A. §17-1763. See the Kansas Secretary of State’s website

http://www.kssos.org/forms/forms_results.asp?division=BS#Charitable%20Organizations. See also Rosenthal, *Good Counsel*, Ch. 5.

⁵⁵ See the Kansas Secretary of State’s website

http://www.kssos.org/forms/forms_results.asp?division=BS#Corporations%20Not%20For%20Profit.

⁵⁶ K.S.A. §17-7504; K.S.A. §17-6004 (“articles of incorporation” defined).

⁵⁷ See the Kansas Secretary of State’s website www.accesskansas.org/annual-reports/index.do. K.S.A. §17-7504; see Phelan, *Nonprofit Law*, §2:27. See the Kansas Secretary of State’s website www.accesskansas.org/ssrv-rora-amend/index.do. K.S.A. §17-6204 (West 2013 Supp.). See Quick, 73-Aug J.K.B.A. 30.

⁵⁸ See Louis, *Missouri Practice*, §35.5, 172-174.

⁵⁹ A Missouri nonprofit corporation does not distribute income or property that is distributable to members, directors, or officers. *Osage Water Co. v. Miller County Water Authority, Inc.*, 950 S.W.2d 569 (Mo. App. S.D.1997). The Missouri Secretary of State’s website has nonprofit filing details (<http://www.sos.mo.gov/business/corporations/startBusiness.asp>), and allows online efilings to start LLCs, but not corporations.

⁶⁰ V.A.M.S. §355.881(1).

⁶¹ V.A.M.S. §355.096.2. See also V.A.M.S. §355.881.

⁶² V.A.M.S. §§355.066(23) (West 2013 Supp.), 355.066(28) (West 2013 Supp.), 355.881. See Van Dyke, *Missouri Corporate Practice*, §18-1.

interests may be transferred or sold.⁶³ A Missouri nonprofit corporation's annual report must be filed with the Secretary of State by August 31.⁶⁴

III. Articles of Incorporation – Key Provisions to Include

Articles of incorporation give birth to a nonprofit corporation, so the first breaths of incorporation are crucial.⁶⁵ Nonprofit articles of incorporation must include certain elements and be filed with the state Secretary of State's office.⁶⁶ The nonprofit's counselor should also file for any necessary state regulatory permits for the client.⁶⁷ Sample articles of incorporation are included in Exhibit A.⁶⁸

Kansas and Missouri have similar nonprofit incorporation laws. Missouri law requires the articles of incorporation to (1) designate the nonprofit as a public or mutual benefit corporation and to (2) explain how the nonprofit's assets are to be distributed upon distribution.⁶⁹ While the second distinction is not expressly in Kansas law, it is required by the IRS before approving a nonprofit's tax exempt status.⁷⁰

➤ **Kansas Practice Pointer – Necessary provisions for Kansas nonprofit articles of incorporation:**

- The corporation's name
- The registered office's address and resident agent's name
- A general or specific statement of the corporation's purposes
- Each incorporator's name and address

⁶³ V.A.M.S. §355.691.1(7); see Van Dyke, Missouri Corporate Practice, §18-1.

⁶⁴ V.A.M.S. §355.856.3 (West 2013 Supp.); see Van Dyke, Missouri Corporate Practice, §18-17. A Missouri nonprofit that fails to timely file its annual report must pay a reinstatement fee or be administratively dissolved. V.A.M.S. §§355.856.3, 355.706 (West 2013 Supp.). Upon incorporating, the annual report is due August 31 of the year after incorporation, and the corporation must continue filing annual reports by August 31 of each succeeding year. See Van Dyke, Missouri Corporate Practice, §18-17.

⁶⁵ K.S.A. §17-6006. See Hopkins, Tax-Exempt Organizations, §4.2, 64-65; see Rosenthal, Good Counsel, 22; see Phelan, Nonprofit Organizations, §§ 1:12-1:18; see Epps, Kansas Corporate Law, Ch. 6; see Van Dyke, Missouri Corporate Practice, §18-3.

⁶⁶ K.S.A. §17-6002(a); V.A.M.S. §§ 355.096.2, 355.096.3.

⁶⁷ See Rosenthal, Good Counsel, 23.

⁶⁸ See Martin, Kansas Corporation Law, Apps. 12A and 12B.

⁶⁹ K.S.A. §17-6805a; see Martin, Kansas Corporation Law, §12.2.2.

⁷⁰ See Martin, Kansas Corporation Law, §12.2.2 (arguing that omitting an asset distribution framework from the articles of incorporation will jeopardize the nonprofit's IRS tax exemption application).

- Initial directors' names and addresses.⁷¹
- Asset distribution framework upon dissolution.
- **Missouri Practice Pointer – Necessary provisions for Missouri nonprofit articles of incorporation:**
 - The corporation's name
 - Public or mutual benefit corporation
 - The registered office's address and resident agent's name
 - Each incorporator's address
 - Corporation's members, if any
 - Asset distribution framework upon dissolution.⁷²
- a. Governing Body**

A nonprofit corporation is governed by a board of directors.⁷³ The board of directors manage the nonprofit corporation's activities and possess similar powers to a for profit corporation's board of directors, except that a nonprofit corporation's board of directors may not engage in activities that would jeopardize the corporation's tax exempt status with state and federal governments.⁷⁴ The articles of incorporation or bylaws may contain provisions electing options on certain nonprofit management issues; otherwise state corporate law applies by default.⁷⁵ Board members have state law fiduciary duties of care, loyalty, and obedience to uphold.⁷⁶ Board independence is a "hallmark of good nonprofit governance" for the IRS.⁷⁷ Boards should not be "too small, too insular, or too

⁷¹ K.S.A. §17-6002; see also Quick, 73-Aug J.K.B.A. 30, 32. See Epps, Kansas Corporate Law, §6-2; see Martin, Kansas Corporation Law, §12.2.2.

⁷² See V.A.M.S §355.025; see Louis, Missouri Practice, §35.7; see Ziegenhorn & Fast, Missouri Practice, §§48.11, 48.13, 668-669, 670, 671.

⁷³ K.S.A. §17-6301; V.A.M.S. §355.316.1 et seq.; see Hopkins, Nonprofit Boards; see Epps, Kansas Corporate Law, §18-8; see Van Dyke, Missouri Corporate Practice, §18-11; see Hopkins, Tax-Exempt Organizations, Ch. 5; see Louis, Missouri Practice, §35.6, 174 (Missouri law requires at least 3 directors, V.A.M.S §355.321.2); see Ziegenhorn & Fast, Missouri Practice, §§48.2, 662-663.

⁷⁴ V.A.M.S. §355.131; see Van Dyke, Missouri Corporate Practice, §§18-9 and 18-11.

⁷⁵ See Epps, Kansas Corporate Law, §6-4; see Louis, Missouri Practice, §35.26.

⁷⁶ See Rosenthal, Good Counsel, 8, 9 (fiduciary duty checklist); see Martin, Kansas Corporation Law, §12.2.9 (exploring Burcham v. Union Bancorp, Inc., 276 Kan. 393 (2003) (duty of care and the business judgment rule), Becker v. Knoll, 40 Kan. App.2d 1049, 1053 (2008) (duty of loyalty means that its corollary, self dealing, must be prohibited)).

⁷⁷ See Rosenthal, Good Counsel, 34.

deferential” to the nonprofit’s leader. Board members should be selected based on “ability and availability to fulfill fiduciary duties, providing the critical oversight function. Board attention is crucial to good governance.”⁷⁸ Board members should receive a handbook of materials including key organizational documents, policies, and procedures.⁷⁹

The nonprofit board of directors has many responsibilities, including: (1) determine mission and purposes, (2) select the chief executive, (3) support and evaluate the chief executive, (4) ensure effective planning, (5) monitor and strengthen programs and services, (6) ensure adequate financial resources, (7) protect assets and provide financial oversight, (8) build a competent board, (9) ensure legal and ethical integrity, and (10) enhance the organization’s public standing.⁸⁰ Adopting best practices will improve a nonprofit’s governance.⁸¹ Corporate governance is a focal point of the public eye as activist investors, boards, officers, executives, and influential people and groups across society push for increased corporate responsibility, shareholder democratization, and other changes to corporations.⁸² Suffice to say, we “live in an era of heightened awareness” about “nonprofit governance.”⁸³

b. Purpose Clause

The purpose clause or mission statement is crucial to the articles of incorporation as it establishes what the nonprofit will do.⁸⁴ Missouri provides a non-exclusive list of nonprofit purposes.⁸⁵ The purpose clause should be carefully tailored to satisfy the IRS’ primary purpose test – is the corporation’s primary purpose charitable or nonprofit? – and the purpose clause should be refined as needed to withstand IRS scrutiny.⁸⁶

⁷⁸ See Rosenthal, Good Counsel, 60.

⁷⁹ See Rosenthal, Good Counsel, 49-50.

⁸⁰ See Crompton presentation, Slides 12, 16, 18, 20, 22, 24, 26, 28, 30, 32, and 35.

⁸¹ See Louis, Missouri Practice, §35.8, 177-179.

⁸² See Rosenthal, Good Counsel, 62-63. The voluminous corporate governance literature on activist investors, shareholder democratization, and corporate social responsibility is beyond this article’s scope.

⁸³ See William Quick and Amy H. Abrams, “Disclosure Obligations of Kansas Private Nonprofit Organizations,” 79-Mar J.K.B.A. 20, 21 (“Quick and Abrams”).

⁸⁴ See Rosenthal, Good Counsel, 7; see Ziegenhorn & Fast, Missouri Practice, §48.21 et seq., 677.

⁸⁵ V.A.M.S. §355.025.

⁸⁶ See Hopkins, Tax-Exempt Organizations (10th ed., 2011), §4.4, at 72-77, §5.2 (2013 Supp., at 12); see Simpson, Tax Compliance for Tax Exempt Organizations, §3.05, at 101-116.

Here is a sample purpose clause or mission statement⁸⁷:

The Corporation is organized exclusively for charitable, religious, educational and scientific purposes within the meaning of Code Sections 501(c)(3), 170(c)(2)(B), 2055(a)(2) and 2522(a)(2), including for those purposes and the making of distributions to organizations that qualify as exempt organizations under Code Section 501(a) by reason of Code Section 501(c)(3). The Corporation's purposes shall include, but not be limited to, _____ . To enable the Corporation to carry out its purposes, it shall have the power to do any and all lawful acts and to engage in any and all lawful activities, directly or indirectly, alone or in conjunction with others, which may be necessary, proper or suitable for the attainment of any of the Corporation's purposes.

Later presentations will cover the IRS Code's requirements and tax law compliance issues. As the corporate lawyer peers through the nonprofit incorporation lens, the purpose clause's importance comes into sharp focus. For profit corporations have broad latitude and minimal corporate law boundaries and may override some default provisions with specific language in the organic documents. By contrast, a nonprofit corporation's purpose statement curbs the corporate law latitude and often prescribes activities which fit within the four corners of Code §501(c)(3)'s "charitable, religious, educational and scientific purposes" to qualify for tax exempt status. Practitioners and nonprofit incorporators should devote ample time to crafting a purpose statement to ensure tax exempt status is awarded and to help focus the nonprofit participants on what its goals, ends, and aims will be.

c. Dissolution Clauses

Corporations are perpetual, but a specific nonprofit rationale may be achieved or become obsolete. The wise corporate counsel will draft articles of incorporation with dissolution provisions.⁸⁸ Dissolution can involve a sale of assets and be voluntary or (involuntary) court ordered.⁸⁹ When will the nonprofit corporation dissolve? Under what circumstances? Who makes those decisions? What if the nonprofit corporation's stated goals are achieved? What if the nonprofit corporation's purposes become illegal or

⁸⁷ See Exhibit A, "Article III – Objects and Purposes."

⁸⁸ See Hopkins, Tax-Exempt Organizations, §4.3(b), at 69-70 and West 2013 Supp., 11.

⁸⁹ Phelan, Nonprofit Organizations, §7:5; see id., §§7:6-7:9; see id., §§7:6-7:9; see Simpson, Tax Compliance for Tax Exempt Organizations, §3.06, at 116-117.

irrelevant? Well crafted dissolution clauses in the nonprofit corporation's articles of incorporation will answer these and other questions, and is vital to obtaining IRS tax exemption.⁹⁰

A trust law story provides illuminating parallels when considering effective planning for changes in nonprofit purposes and drafting dissolution clauses. Arthur Mag (1896-1981) was a legendary Kansas City corporate and trust attorney and founding partner of what is now Stinson Leonard Street LLP (formerly Stinson Morrison Hecker LLP and Stinson, Mag & Fizzell PC), whom, among other distinguished work, served as the attorney for numerous charitable trusts established by prominent Kansas Citians in the early 20th century.⁹¹ At the time, trust law did not allow charitable trust reformation, even if the trust's purposes had become obsolete (a disease cure discovered or the Alf Landon for President Campaign of 1936 fizzled) or illegal. Mr. Mag and his associates blazed trust law trails for generations of corporate and trust attorneys, and received vindication of charitable trust reformation from Missouri's federal courts.⁹² This local angle on the creation of modern charitable trust law illustrates the importance of careful drafting and planning when working with tax exempt organizations, as the practitioner's work needs to be adaptable enough to endure the test of time.

A Kansas nonprofit corporation's dissolution clause should include the following or similar language:

Upon the corporation's dissolution, the corporation's board of directors or governing body, after paying or providing for the payment of all the corporation's liabilities, shall dispose of all the corporation's assets exclusively: (1) According to the corporation's purposes, in the manner determined by the board of directors or governing body, or (2) to organizations qualified for exemption under Code Section 501(c)(3), and specified by the board of directors or governing body. Any corporation assets not so disposed of shall be disposed of by the district court of the county where the corporation's principal office is

⁹⁰ K.S.A. §§17-6801 et seq., 17-6805a; see Martin, Kansas Corporation Law, §§12.5, 12.2.2; V.A.M.S. §355.666 et seq.; see Louis, Missouri Practice, §35.16; see Ziegenhorn & Fast, Missouri Practice, §48:81.

⁹¹ See Donald H. Chisholm, "The Philanthropic Philosophy of Arthur Mag" (1998), at <http://www.umkc.edu/whmckc/PUBLICATIONS/KIMBALL/CNKPDF/Chisholm-10-21-1998.pdf>.

⁹² See Irwin v. Swinney, 45 F.2d 890 (W.D. Mo. 1930), Gossett v. Swinney, 53 F.2d 772 (8th Cir. 1931) (approving Mag's charitable trust innovation in the Will of Harry Wilson Loose (1876-1927)).

then located, exclusively for the purposes or to the organizations provided above, as determined by the court.⁹³

Missouri has certain requirements to dissolve a nonprofit corporation.⁹⁴ A dissolving Missouri public benefit nonprofit corporation may distribute its remaining assets to one or more public benefit nonprofit corporations or foreign nonprofit corporations, if the articles of incorporation are silent on point.⁹⁵ A dissolving Missouri mutual benefit nonprofit corporation may distribute its remaining assets to its members, or if it has no members, to those who it holds itself out as serving, if the articles of incorporation are silent on point.⁹⁶ A dissolving Missouri public benefit nonprofit corporation must notify the Missouri Attorney General's office in writing of its asset distribution plans.⁹⁷

d. Provisions Required by IRS

The IRS requires two sets of provisions. First, a nonprofit corporation must state its nonprofit, educational, religious, scientific, or other charitable objectives.⁹⁸ Second, the corporation's activities must be constrained within its nonprofit boundaries to maintain its tax exempt status.⁹⁹ The IRS requires two disclosures from nonprofits: first, the organization's IRS application for exemption on Form 1023 or 1024, and second, the nonprofit's 3 most recent Forms 990.¹⁰⁰ Importantly, a Missouri mutual benefit nonprofit corporation does not automatically qualify for IRS tax exempt status upon proper formation under Missouri law, because a mutual benefit corporation's activities may cross nonprofit boundaries and turn a profit.¹⁰¹

⁹³ K.S.A. §17-6805a.

⁹⁴ V.A.M.S. §355.676.

⁹⁵ V.A.M.S. §355.691.1(6) (West 2013 Supp.). There is no deadline for winding down the corporation. See DeBaliviere Place Ass'n v. Veal, 337 S.W.3d 670 (Mo. 2011).

⁹⁶ V.A.M.S. §355.691.1(7).

⁹⁷ V.A.M.S. §355.676(1).

⁹⁸ See Hopkins, Tax-Exempt Organizations, §4.3(a), at 66-69; see Simpson, Tax Compliance for Tax Exempt Organizations, §3.03, at 98-99.

⁹⁹ See Epps, Kansas Corporate Law, §18-7; see Simpson, Tax Compliance for Tax Exempt Organizations, §3.04, at 100-101; see Louis, Missouri Practice, §35.6, 175 (Missouri endowment fund law)

¹⁰⁰ See Quick and Abrams, 79-Mar J.K.B.A. 20, 21 (noting that while "most best practices guidance suggests various record disclosures for nonprofits," federal tax law imposes "few disclosure obligations").

¹⁰¹ See Van Dyke, Missouri Corporate Practice, §18-4.

e. Other Crucial Language

In our modern litigious environment, a nonprofit corporation should have several policies in place. These policies may include a compensation policy, a whistleblower policy, a document retention and destruction policy, a travel and other expense reimbursement policy, a gift acceptance policy, a joint venture policy, a conflict of interest policy or a conflicts of interest and documentation policy, interested party transactions, policies adopted by an interested party transaction committee, and a media relations policy.¹⁰² These various policies may be adapted as needed for a nonprofit corporation's unique size, complexity, activities, and composition, and may be separate standing policies duly adopted by the Board of Directors, or integrated as clauses in the By-Laws. Directors, officers, and employees should confirm in writing receipt, review, and compliance with the nonprofit's policies.¹⁰³ These policies are best practices for nonprofit corporations and will help directors, officers, employees, professional advisors, volunteers, and donors by clarifying the nonprofit corporation's position on various issues and what activities are or are not appropriate for those interacting with the nonprofit corporation.¹⁰⁴ Given the diverse nature of nonprofit organizations, use discretion to determine which policies and procedures are best practices for a particular organization and the precise contours of those policies.

¹⁰² See *id.*, Forms 18-4 (compensation), 18-5 (whistleblower), 18-6 (record retention) (cf. Rosenthal, Good Counsel, 40 and see IRS Publication 583), 18-7 (travel and expense reimbursement), 8-8 (gifts) (cf. Rosenthal, Good Counsel, 40-41), 18-9 (joint venture) (cf. Rosenthal, Good Counsel, 41-43), 18-12 or 18-15 (conflicts of interest) (cf. Rosenthal, Good Counsel, 36-38, and IRS sample (www.irs.gov/instructions/i1023/ar03.html), 18-12A (Missouri conflicts of interest and documentation); see Martin, Kansas Corporation Law, §12.3.10. see Rosenthal, Good Counsel, 35-36; see Epps, Kansas Corporate Law, Form 18-5 (Kansas conflicts of interest); see *id.*, Form 18-8 (Kansas conflicts of interest and documentation); Hopkins, Tax exempt Organizations, §5.6(f)(iii) and (iv), at 136-137; see Martin, Kansas Corporation Law, §§12.2.9 and 12.2.10 (conflicts of interest); see Van Dyke, Missouri Corporate Practice, Form 18-13 (Missouri interested party transactions); Epps, Kansas Corporate Law and Practice, Form 18-6 (Kansas interested party bylaw); see Van Dyke, Missouri Corporate Practice, Form 18-14 (Missouri interested party committee); Epps, Kansas Corporate Law and Practice, Form 18-7 (Kansas interested party committee); see Rosenthal, Good Counsel, 38-40 (whistleblower policy) and 50 (media relations policy).

¹⁰³ See Rosenthal, Good Counsel, 37, 44-45.

¹⁰⁴ See Hopkins, Tax-Exempt Organizations, §5.3; see Ziegenhorn & Fast, Missouri Practice, §48.2.

IV. Bylaws – Key Provisions to Include

If the articles of incorporation are the nonprofit corporation's life breath, the Bylaws are the nonprofit corporation's DNA, laying out the nonprofit's activity blueprint and organizational tapestry.¹⁰⁵ Nonprofit bylaws may contain any provision consistent with the articles of incorporation.¹⁰⁶ A nonprofit corporation must file Bylaws with the state Secretary of State's office.¹⁰⁷ Sample nonprofit corporation Bylaws may be found in a corporate law treatise.¹⁰⁸

a. Directors and Officers

The board of directors and officers oversee and run the nonprofit corporation, so their composition, authority, and actions determine the organization's pulse.¹⁰⁹ A wise corporate counsel will advise directors and officers to adopt nonprofit best practices.¹¹⁰ How are directors and officers of the nonprofit corporation to be selected?¹¹¹ How long will their terms of service last?¹¹² What procedures are to be followed in selecting their replacements or successors? May a director or officer be removed?¹¹³ May a director or officer resign?¹¹⁴ What, if any, compensation will a director or officer receive for his or

¹⁰⁵ See Phelan, Representing Nonprofit Organizations, § 1:19. See Hopkins, Tax-Exempt Organizations, §4.2, at 65; see Rosenthal, Good Counsel, 23-24.

¹⁰⁶ V.A.M.S. §355.116. See Ziegenhorn & Fast, Missouri Practice, §48.32, 680-681; see also Boatman's First Nat'l Bank of West Plains v. Southern Missouri Dist. Council of the Assemblies of God, 806 S.W.2d 706 (Mo App. S.D. 1991) and Missouri State Teacher's Ass'n v. St. Louis Suburban Teachers Ass'n, 622 S.W.2d 745 (Mo App. E.D. 1981).

¹⁰⁷ K.S.A. §17-6009; V.A.M.S. §355.116; see Epps, Kansas Corporate Law, §18-7; see Van Dyke, Missouri Corporate Practice, §18-10.

¹⁰⁸ See Epps, Kansas Corporate Law, Ch. 11; see Martin, Kansas Corporation Law, §12.2.3; see Van Dyke, Missouri Corporate Practice, Forms 11-2 (bylaws with members) and 11-3 (bylaws without members); see Louis, Missouri Practice, §35.12. Kansas' corporate law landscape follows Delaware law, while Missouri corporate law contours follow Illinois law and the Model Business Corporation Act.

¹⁰⁹ See Hopkins, Tax-Exempt Organizations, Ch. 5 and 2013 Supp., 27-30; see Van Dyke, Missouri Corporate Practice, §18-11; see Louis, Missouri Practice, §35.6; see Martin, Kansas Corporation Law, §§ 12.2.8 (officers) and 12.2.9 (directors).

¹¹⁰ See Rosenthal, Good Counsel.

¹¹¹ K.S.A. §§17-6301(a), (b), (c), (d), 17-6501(f). See Quick, 73-Aug J.K.B.A. 30, 35-36. V.A.M.S. §§ 355.301, 355.321, 355.326.

¹¹² V.A.M.S. §§355.331 (West 2013 Supp.) (1 year default term and non-designated or appointed directors may serve up to 6 years), 355.336 (staggered terms).

¹¹³ See Martin, Kansas Corporation Law, §12.3.11; K.S.A. §17-6301(k) (removal) and see Quick, 73-Aug J.K.B.A. 30, 33-34. K.S.A. §§17-6513(a) and (d). V.A.M.S. §§ 355.341 (resignation), 355.346 (removal), 355.351 (removal by articles of incorporation or bylaws amendment), 355.386 (removal by court).

¹¹⁴ See ante note 112 about resignations. K.S.A. §17-6302(b).

her service to the nonprofit corporation?¹¹⁵ And if a vacancy arises?¹¹⁶ Will the board of directors include committees?¹¹⁷

The Bylaws should have or reference a conflict of interest policy, especially for interested party transactions involving directors or officers.¹¹⁸ As with for profit corporations, a nonprofit corporation's director or officer may be involved with an outside entity that conducts business with or provides services to the nonprofit. Interested party transactions are not per se prohibited, but must be conducted transparently, with accountability to the board of directors and the members, and not be preferential or self dealing transactions.¹¹⁹

b. Meetings

Every corporation, whether for profit or nonprofit, must have regular meetings.¹²⁰ The attorney should counsel her nonprofit client that "taking minutes is an art" and minutes "are not private to board members."¹²¹ A nonprofit's meetings may be subject to the Kansas Open Meetings Act.¹²² The board of directors must meet and keep minutes.¹²³ Sample minutes are included in Exhibit B.¹²⁴ The shareholders of a for profit corporation, or the members of a nonprofit corporation, must also have at least annual meetings to discuss and vote on the corporation's business affairs, director, and officer elections, and the like. When will those meetings be held? What procedures will be used for providing

¹¹⁵ K.S.A. §17-6301(h). See Quick 73-Aug J.K.B.A. 30, 33. V.A.M.S. §355.366 (no director compensation unless articles of incorporation or bylaws allow); see Van Dyke, Missouri Corporate Practice, Form 18-4.

¹¹⁶ K.S.A. §§17-6302(e), 17-6513. V.A.M.S. §355.361.

¹¹⁷ K.S.A. §17-6301(c)(3) and see Quick 73-Aug J.K.B.A. 30, 33.

¹¹⁸ See e.g. Louis, Missouri Practice, §35.27 (2012 Supp.); see also ante note 101.

¹¹⁹ See Epps, Kansas Corporate Law, §18-16; see Van Dyke, Missouri Corporate Practice, Form 18-13. See Exhibit D for a conflict of interest and interested party transaction policy. See also Exhibit B, ¶6.10. See also ante note 101.

¹²⁰ K.S.A. §§17-6301(f) and (g). See also Quick, 73-Aug J.K.B.A. 30, 35-36. V.A.M.S. §355.376. See Louis, Missouri Practice, §35.9; see Ziegenhorn & Fast, Missouri Practice, 48:51.

¹²¹ See Rosenthal, Good Counsel, 50-52.

¹²² K.S.A. §75-4318 (Kansas Open Meetings Act) and see Quick and Abrams, 79-Mar J.K.B.A. 20, 22-24. Missouri's sunshine law does not appear to apply to nonprofit organizations. V.A.M.S. §610.010 et seq.

¹²³ See Phelan, Nonprofit Organizations, §§ 1:18 and 1:20. V.A.M.S. §355.431.2; see Ziegenhorn & Fast, Missouri Practice, 48:41.

¹²⁴ Mr. Andres used the minutes in Exhibit B for the Kelsey Smith Foundation.

notice of the meetings to members of the nonprofit corporation? Who will keep minutes of the meetings?¹²⁵ In what form, or where will those meeting minutes be kept?¹²⁶

c. Voting

What constitutes a quorum of members?¹²⁷ Must voting be done in person? Are proxy votes by mail, phone, or electronically (via email, text, Internet, video conference, or virtual meeting software) permissible?¹²⁸ What form of proxy voting is allowed?¹²⁹ How are proxy votes authenticated?¹³⁰ Do all members receive one vote, or do some members receive super voting powers? How are voting rights determined and regulated?¹³¹ Is cumulative voting allowed?¹³² Does a majority carry the day on a motion, or is a super majority required? Are voting trusts allowed, and if so, what parameters apply? Who collects and tabulates the votes? What if there is a dispute about the vote count? If the vote is close, is an automatic or optional recount allowed?

d. Indemnification

Everyone involved in a nonprofit organization, from the directors, to the officers, to the members, and even the donors and volunteers needs some indemnification consideration.¹³³ Attorney fees and other expenses may be advanced or paid for directors and officers.¹³⁴ Directors and officers will seek indemnity for their actions on behalf of the nonprofit corporation just as for profit corporation directors and officers seek indemnity.¹³⁵ They may desire director and officer's (D&O) insurance if it is available.¹³⁶

¹²⁵ V.A.M.S. §355.431.2; K.S.A. §17-6302(a) and Martin, Kansas Corporation Law, §12.2.7(c).

¹²⁶ K.S.A. §17-6514.

¹²⁷ K.S.A. §17-6505(c); see Quick, 73-Aug J.K.B.A. 30, 31-32 (“members in attendance of a duly called and noticed meeting constitute a quorum”) and Martin, Kansas Corporation Law, §12.2.7(e). V.A.M.S. §355.401.

¹²⁸ K.S.A. §17-6301(i). V.A.M.S. §355.291.

¹²⁹ K.S.A. §17-6505(b) (proxy voting allowed up to 3 years per proxy unless the proxy allows a longer term) and see Quick, 73-Aug J.K.B.A. 30, 36.

¹³⁰ K.S.A. §17-6501(a)(2).

¹³¹ K.S.A. §§17-6502(a) and 17-6504. V.A.M.S. §355.276.1.

¹³² K.S.A. §17-6504.

¹³³ See Phelan, Nonprofit Organizations, §§ 1:28-1:45; see Rosenthal, Good Counsel, 73. K.S.A. §17-6305 (West 2013 Supp.) and see Quick, 73-Aug J.K.B.A. 30, 34. V.A.M.S. §§355.471, 355.476.

¹³⁴ K.S.A. §17-6305 (West 2013 Supp.) and see Quick, 73-Aug J.K.B.A. 30, 34.

¹³⁵ K.S.A. §17-6305 (West 2013 Supp.); V.A.M.S. §§355.461(1), (2); see Hopkins, Tax-Exempt Organizations, § 5.4(b), at 124.

¹³⁶ K.S.A. §17-6305(g); V.A.M.S. §355.496; see Hopkins, Tax-Exempt Organizations, § 5.4(c), at 124-125.

Members need indemnification if directors or officers make a mistake that disrupts the nonprofit's tax exempt status.¹³⁷ Volunteer directors and officers and donors may qualify for financial and/or activity indemnification in Kansas and Missouri.¹³⁸ The corporation's articles of incorporation or by laws may contain indemnification and advancing expenses to directors.¹³⁹

V. Mission Statement

A nonprofit corporation's mission statement is crucial: both to obtain and maintain tax exempt status as an organization from the IRS, and to maintain similar tax exempt status from the state.¹⁴⁰ An attorney advising a nonprofit organization should take care to ensure that the organization's mission statement clearly states its nonprofit goals with reference to the traditionally recognized nonprofit purposes: educational, religious, charitable, scientific, etc.¹⁴¹ IRS Form 990 has been redesigned to emphasize a nonprofit organization's mission statement, especially for public charities, so a mission statement is becoming increasingly important in the nonprofit incorporation process.¹⁴² While a purpose clause needs to be included in the nonprofit's organic documents, a mission statement may take considerably more time to formulate, and can be added some months later.

Here is the Kelsey Smith Foundation's mission statement, which Mr. Andres wrote while advising the Foundation:

The Kelsey Smith Foundation was established to honor and perpetuate the life of Kelsey Smith and to empower communities to proactively protect the community's most precious resource - its children and youth. The foundation

¹³⁷ Missouri nonprofit corporation members are not personally liable for the corporation's debts, V.A.M.S. §355.197, but a Missouri nonprofit corporation member is liable for unpaid capital contributions or membership dues, and may be liable to the nonprofit corporation's creditors. See Van Dyke, Missouri Corporate Practice, §18-13.

¹³⁸ K.S.A. §60-3601; see Martin, Kansas Corporation Law, §12.2.9; see Louis, Missouri Practice, §35.8.;

42 U.S.C.A. §14503 (Federal Volunteer Protection Act (1997)).

¹³⁹ K.S.A. §17-6305 (West 2013 Supp.); V.A.M.S. §355.501.

¹⁴⁰ V.A.M.S. §355.025; see Rosenthal, Good Counsel, 28-34.

¹⁴¹ See Hopkins, Tax-Exempt Organizations, §4.3(a), at 66-69, and 2013 Supp., at 11. The IRS Stay Exempt website has helpful materials, publications, and brief presentations. See (<http://www.stayexempt.org>), as visited 28 October 2013.

¹⁴² See *id.*, §4.3(c), at 70; see Rosenthal, Good Counsel, 134-135.

does this by providing education, information and resources dedicated to safeguarding children and youth, as well as resources should a child or youth be abducted. These services are provided in a variety of formats and are available both electronically, in print, and by direct presentation to community groups, organizations and schools, as well as any other interested parties.

The mission statement focuses on the organization's nonprofit goals and charitable and educational purposes. It then expounds how these goals and purposes are to be achieved – by providing educational and informational resources to parents and children regarding the dangers of abduction, as well as resources to help locate and protect a child who has been abducted. It specifies these resources will be delivered in a variety of formats and media, and the target audience for the resources.

VI. The Use of LLCs (and L3Cs) for Nonprofits

We have explored the nonprofit incorporation process. Traditional nonprofit corporations have been used for nearly 100 years. But as the corporate law world has shifted in emphasis from corporations to partnerships to limited liability companies (LLCs) and innovative hybrid entities, how should corporate lawyers apply these innovations to nonprofit organizations? Can a limited liability company and/or a low profit limited liability company be a nonprofit? Yes.¹⁴³ Kansas law even appears to allow an existing nonprofit corporation to convert to an LLC, but careful compliance with IRS tax exempt rules is required.¹⁴⁴

a. LLCs as Nonprofits

Limited liability companies (LLCs) are an integral tool in the corporate lawyer's repertoire.¹⁴⁵ Like corporations and partnerships, LLCs are creatures of state law.¹⁴⁶ “An

¹⁴³ See Isaac Lodico, “Limited Liability Companies as Tax exempt Organizations,” (<http://www.insightcced.org/uploads/publications/legal/LLCs-as-exempt-orgs.pdf>).

¹⁴⁴ K.S.A. §17-78-101 et seq (the Kansas Business Entity Transactions Act). See Edwin W. Hecker, Jr., The Kansas Business Entity Transactions Act, 80 J. Kan. B.A. 8 (Sept. 2011). V.A.M.S. §347.700 et seq. (Merger and Consolidation of Certain Business Organizations).

¹⁴⁵ See Stephen M. Bainbridge, *Agency, Partnerships & LLCs* (Foundation Press, 2004), Ch. 4. For Kansas LLC law's contours, see Edwin W. Hecker, Jr., The Kansas Revised Limited Liability Company Act, 69 J. Kan. B.A. 16 (Nov./Dec. 2000).

LLC with two or more charitable or governmental members can be a tax exempt charitable organization if it meets 12 conditions specified by the IRS.¹⁴⁷ LLCs have become “the vehicle of choice” for joint ventures among tax exempt organizations.¹⁴⁸

b. L3Cs as Non Profits

If LLCs are a fresh, but reliable, player in the corporate law landscape, L3Cs are the rookies making their debut.¹⁴⁹ An L3C (low-profit limited liability company) is a hybrid for profit LLC and tax exempt organization.¹⁵⁰ An L3C is a type of LLC whose business purpose is to take donations from private foundations and spend those monies as a qualifying program related investment under the IRS Code.¹⁵¹ The nonprofit practitioner should be aware of L3Cs, while realizing that L3Cs are “only meaningful to a fairly narrow universe of LLCs” and even if an L3C is desirable, the IRS’ verdict is still out, so there is a greater level of risk for an organization, its participants, and its donors to become an L3C.¹⁵² L3Cs have program related investments (PRIs) that may be run by for profit organizations.¹⁵³ It has a charitable purpose, but it may also produce income along the way.¹⁵⁴ An L3C may qualify for tax exempt status if its members are solely charitable organizations.¹⁵⁵ L3Cs are designed primarily to achieve some charitable purpose, and the “production of income” is an acceptable “secondary purpose” for an L3C.¹⁵⁶ A private foundation’s investment in an L3C may or may not qualify as a

¹⁴⁶ See K.S.A. §17-7662 et seq. (Kansas Revised Limited Liability Act). See V.A.M.S. §347.010 et seq. (Missouri Limited Liability Company Act).

¹⁴⁷ See Nicholas G. Karambelas, Limited Liability Companies (2nd ed. 2012), §6:26. See Hopkins, Tax Exempt Organizations, §4.3(d), at 70-71 (listing 12 conditions); see also Karambelas, Limited Liability Companies, §6:26, at 57, citing Internal Revenue Manual, Part 7.20.4-12 (12/5/06), 2007 WLM 7219754.

¹⁴⁸ See Hopkins, Tax-Exempt Organizations, §31.4, at 948.

¹⁴⁹ See Hopkins, Tax-Exempt Organizations, §4.11(c), and 2013 Supp., at 25.

¹⁵⁰ See Phelan, Nonprofit Organizations, Ch. 6.

¹⁵¹ See Karambelas, Limited Liability Companies, §6:26, at 55.

¹⁵² See id., §6:26, at 55-56.

¹⁵³ See e.g. http://money.cnn.com/2010/02/08/smallbusiness/l3c_low_profit_companies/

¹⁵⁴ See the Social Entrepreneurship Law blog (<http://www.socialentrepreneurshiplaw.com/index.html>) and Jamie P. Hopkins and John A. Pearce II, “L3Cs: Bringing Change or in Need of Change?” (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229430). The L3C may move the law closer towards for profit charities. See Eric A. Posner and Anup Maluni, The Case for For-Profit Charities, 93 Virginia Law Review 2017 (2007).

¹⁵⁵ If one L3C member was not a charitable organization, the IRS’ 12 requirements for tax exempt LLCs would not be satisfied, and tax exempt status would be denied.

¹⁵⁶ See Hopkins, Tax-Exempt Organizations, §4.11(c) and 2013 Supp., at 25.

program-related investment under federal tax law.¹⁵⁷ The state law classification of an L3C as charitable or noncharitable under state law does not affect the IRS's federal law verdict.¹⁵⁸ The IRS has not spoken on the validity of L3Cs as tax exempt organizations, so the practitioner advising the prospective nonprofit organization should be wary of using an L3C.¹⁵⁹ 9 states allow L3Cs and some 824 L3Cs exist.¹⁶⁰ Missouri law does not allow L3Cs, but legislation was introduced to recognize L3Cs, and an L3C established in another state may be allowed to operate in Missouri.¹⁶¹ Kansas does not allow L3Cs, but it remains unclear whether Kansas law recognizes an L3C established in another state to allow it to operate in Kansas.¹⁶²

c. Conclusion

We have explored Kansas and Missouri's nonprofit incorporation processes. The attorney advising a nonprofit client should ensure compliance with Kansas or Missouri law and maintain state and federal tax exempt status throughout the nonprofit's life cycle.

Members, employees, directors, officers, and even volunteers and donors serving nonprofit corporations would do also well to consult with an attorney and/or accountant to ensure a nonprofit corporation is complying with state and federal law and that the individual's work with the nonprofit corporation will not have adverse or unforeseen tax or liability consequences for the nonprofit corporation or the individual. With careful planning and good professional counsel, many nonprofit corporations thrive and serve the community well, and individuals can enjoy many years of service in various capacities.

¹⁵⁷ See *id.*

¹⁵⁸ See *id.*

¹⁵⁹ See Karambelas, Limited Liability Companies, §6:26, at 55-56.

¹⁶⁰ Vermont, Michigan, Wyoming, Utah, Illinois, North Carolina, Louisiana, Maine, and Rhode Island allow L3Cs. See "L3C Tally as of May 2, 2013" (http://www.intersectorl3c.com/l3c_tally.html); Anna Fields, "Benefit Corporations, L3Cs and All the Rest," *Forbes*, May 25, 2012, "IRS Rule Could Help the Fledgling L3C Corporate Form," *Forbes*, May 4, 2012, and Lydia Dishman, "L3Cs: The Hybrid Way to Do Well by Doing Good," *Fast Company*, January 26, 2010. (<http://www.forbes.com/sites/annefield/2012/05/25/benefit-corporations-l3cs-and-all-the-rest-making-sense-of-those-confusing-choices/print/>), (<http://www.forbes.com/sites/annefield/2012/05/04/irs-rules-could-help-the-fledgling-l3c/print/>), and (<http://www.fastcompany.com/1526568/l3cs-hybrid-way-do-well-doing-good>).

¹⁶¹ V.A.M.S. §355.025; see Van Dyke, Missouri Corporate Practice, §18-2; see Missouri HB 606.

¹⁶² Kansas *might* recognize the Kansas operations of an L3C validly established in another state under the U.S. Constitution, since there are no apparent public policy hurdles to Kansas' recognition of foreign L3Cs.

May your nonprofit corporation work make a satisfying difference in your life, as the poet Robert Frost memorably wrote:

Somewhere ages and ages hence
Two roads diverged in a wood, and I –
I took the one less traveled by,
And that has made all the difference.¹⁶³

¹⁶³ Robert Frost, “The Road Not Taken,” Mountain Interval, 1920.