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Explanation of Conflict of Interest Policy

TO: Spiritual Care Services of Maine Board of Directors
FROM: Robert H. Levin
RE: Proposed Conflict of Interest Policy
DATE: May 24, 2021

This Memorandum explains key sections of the Conflict of Interest Policy I have prepared for the board's consideration. If you should have any follow up questions or concerns, please appoint one individual to serve as the contact person for me.

First, a few general comments: The aim of this policy is to establish a set of rules and procedures by which the corporation can manage actual or potential conflicts of interest. A conflicts policy is a good idea in its own right, as it will help the corporation avoid any appearance of impropriety among its supporters. It is also a good idea because the Internal Revenue Service and Congress have been scrutinizing the actions of nonprofit charities, and have pushed for the widespread adoption of conflicts policies.

The policy that I have drafted for Spiritual Care Services of Maine is an amalgam of my own research and practical experience, Maine's Nonprofit Corporation Act, and a sample policy recently disseminated by the I.R.S. I have attempted to strike a balance between straightforward, user-friendly language, and, where absolutely necessary, legalese.

Under Maine law, a conflict of interest transaction can be voided by the Attorney General or a court if it is found to be unfair to the corporation, and if the board failed to follow certain decision-making procedures specified in 13-B

M.R.S. § 718. The policy I have drafted is meant to ensure that the board will follow these procedures. In addition, the I.R.S. polices what are known as “excess benefit transactions,” i.e., transactions in which a person is receiving some kind of benefit in excess of what he/she is providing to the corporation. The proposed policy, if observed, will ensure that these regulations are followed.

Every board member should read the proposed Policy thoroughly and make sure they understand all of its provisions. Nevertheless, let me point out a few of the highlights about the policy:

- ❑ The policy does not flatly prohibit conflicts. Rather, it establishes decision-making procedures that ensure transparency and fairness.
- ❑ Disclosure of all “material” facts is at the heart of these procedures. The board cannot make an informed decision if important aspects of the conflict are unexplained. What facts are material will depend on the specific situation, but it is best to err on the side of caution.
- ❑ Another key procedure is recusal of all Interested Persons if an unavoidable conflict exists. Recusal occurs when the person leaves the room so the disinterested persons can have a frank discussion and vote on the matter at hand.
- ❑ Please take note of the definition of a Family Member under Article II(3). Because the purpose of the Conflicts Policy is to promote transparency, I have written this definition so as to encompass a wide scope of relationships, including domestic partners.
- ❑ Also note the definition of Interested Person under Article II(1). Again, because we’re trying to model transparency, I have written the policy to cover not just directors and officers, but also administrators (including its Executive Director and other key employees with administrative responsibilities, if applicable). On the other hand, I have not included other employees or volunteers as Interested Persons, although if non-Board volunteers serving on committees make important decisions, you may want to have them covered by the policy as well. Please let me know about this and I can change things accordingly.
- ❑ Compensation arrangements for employees and certain contractors must be reviewed by the Board to ensure that the compensation levels are reasonable (see V(D)). As the organization’s attorney, I can assist with this process, but it is perfectly doable without my help. The key is to obtain at least three comparable compensations. The IRS has been paying particular attention to compensation levels in recent years.

- It's also important to consider whether a paid employee or contractor should or should not serve on the Board of Directors. Although there is no law against this (other than the 49% limitation discussed in the Overview Letter), my general recommendation is to have the Board consist of volunteers only, and for any employees to not serve on the Board. That said, there are certain circumstances, especially during a sensitive start-up period, when it might make sense for an employee to serve on the Board. But if this occurs, I usually recommend that after few months or a year, that person go off the Board in order to allow the Board to independently fulfill its oversight role.

Of course, a conflicts policy is only useful if it is observed. In many ways, it is better to have no policy at all than a policy that is ignored. Thus, I urge the board to determine how to ensure that the annual disclosure statements are completed and to make a regular practice of screening transactions for potential conflicts. There is no one right way to do this, but I have found that initial screening usually works best if it becomes the express responsibility of one individual, and is not left to the entire board as a whole.

Common Examples of Conflicts of Interest

- ❑ Hiring an Interested Person or the Family Member of an Interested Person as an employee or a consultant. This is a Conflict of Interest, but it is still permissible if the Board decides that this individual is the best person for the job and is being paid a reasonable salary or charging a fair price for the service.
- ❑ Allowing an Interested Person to use the assets of the Corporation for substantial personal use, in a way that is not available to the general public. The word “substantial” is meant to distinguish the occasional personal use of an office copy machine, say.
- ❑ Renting office space from an Interested Person.
- ❑ Corporation’s buying or selling property or a service from/to an Interested Person.
- ❑ Accepting or making substantial gifts to a party engaged in a transaction with the Corporation. Again, insubstantial gifts, that are not meant to influence a decision-making process, are perfectly acceptable.
- ❑ Serving on the board of the Corporation and on a local government entity, such as the planning board or the town council. Again, this arrangement is quite common in Maine. The key is transparency, disclosure, and recusal.
- ❑ Loans from an Interested Person to the Corporation: permitted, if the loan terms are fair and equitable to the Corporation.
- ❑ Loans from the Corporation to an Interested Person: flatly prohibited by Maine law. Just say no!

These are simply some common examples of Conflicts of Interest. Many others kinds of conflicts exist and must be handled in accordance with the Conflict of Interest Policy.