



Jessica Birken, MNM, Esq.
Birken Law Office PLLC
1400 Van Buren St. NE
Suite 200
Minneapolis, MN 55413
www.birkenlaw.com
Office: 612.200.3679

The Sky is Falling - Transcript

[Speaker 1]

Welcome to Charity Therapy, the podcast where we explore the ups and downs of the nonprofit sector and answer your burning questions. I'm your host, Jess Birken, owner of Birken Law Office, and I'm excited you're here. Imagine hanging out with me and my super smart, funny nonprofit expert pals.

You get to ask them anything about your nitty gritty nonprofit life and get their wisdom for free. Whether you're a seasoned pro or just strapping on your nonprofit boots, we're here to share stories and remind you, you're not alone on this journey. So get ready to join the conversation and bring me the tough questions.

I ain't scared. Ready to rock? Let's dive in.

Hello, and welcome to this episode of Charity Therapy. I'm here with my intrepid co-host Meghan. Hey, Jess, how are you?

[Speaker 2]

I'm good. I'm excited.

[Speaker 1]

Okay, I was about to say I'm excited that it's pumpkin spice season, but then I realized that's a very loaded sentence. People have very strong feelings about that. I don't literally mean pumpkin spice.

I just mean that it's not 100 degrees outside. I'm excited.

[Speaker 2]

I like pumpkin spice. If this causes controversy, I'm ready. Bring it.

[Speaker 1]

Torches and pitchforks for pumpkin spice. Meghan's going to go down.

[Speaker 2]

Torches and pitchforks?

[Speaker 1]

I almost said that. I heard it. I corrected. I corrected.

[Speaker 2]

Yep. I just had to call you out anyway.

[Speaker 1]

I will drink some PSL, man. I will.

[Speaker 2]

Yeah, I'll make some pumpkin bread.

[Speaker 1]

But you know when I'm not going to drink that shit is when it's 100 degrees outside.

[Speaker 2]

Nope.

[Speaker 1]

So. Nope. It's September and I officially declare no more days are allowed to be over 90 until.

[Speaker 2]

Yeah. No more triple digits.

[Speaker 1]

Nope. Sorry.

[Speaker 2]

All done. We're over it. We're over it.

[Speaker 1]

All right. What the hell are we doing today?

[Speaker 2]

All right. Today we're talking about conflict.

[Speaker 1]

Oh, like pumpkin spice latte conflicts.

[Speaker 2]

It's the biggest conflict any of us have to deal with. And honestly, like most people, when they think of conflicts, they're thinking about like disagreements and arguments and stuff like that, and we live in Minnesota, It's like conflict avoidant and passive aggressive.

[Speaker 1]

Oh yeah.

[Speaker 2]

And conflicts are like bad things, right? Like avoid at all costs. But that's not the kind of conflict we're talking about, actually.

So throw all that out the window. And a nonprofit, when we're talking about conflicts, we're really talking about conflicts of interest. And when I talk to people and they call us, there's like a lot of uncertainty and fear and anger around conflicts.

So I feel like just we just need a breakdown of like what is a conflict of interest and like why do we care about it?

[Speaker 1]

Yeah. So you're right, especially where in, you know, states that have indirect communication as their primary mode. People are, they don't like conflict, and they don't like the word conflict.

Like I feel like if we had a different word for it, people wouldn't freak out so much about it. And really just a conflict of interest means like you have divided loyalty. So like you can't necessarily be sure that you're acting for the right thing because you're being pulled in like at least two directions.

So that's really what a conflict of interest means. It just means that there is some competing interest that might make you have a bias or might make you not make decisions that are in the best interest of the nonprofit. So like if you were going to get money, you would have a financial conflict of interest.

If you sit on two boards of directors and maybe they're going to enter into a contract together, it would be hard for you to sit on both of those boards and have an opinion about the contracts because you basically are on both sides. So it's not that they're bad and it doesn't mean arguing. It just is something that we need to be aware of and that needs to be managed.

And sometimes like you can't even avoid them. They're just going to happen. But that doesn't mean like the situation can't exist.

It just needs to be dealt with.

[Speaker 2]

Right. It's not a choice you're making necessarily. It's just like an environmental like situational setup.

But I feel like we could like go on about this forever in the theoreticals. So I'm going to cut you off here and just go straight into our question. So are you ready for the big question?

[Speaker 1]

I am so ready. I was born ready. Bring the question.

[Speaker 2]

Bring it on. All right. A listener wrote in and said, I founded a nonprofit with my sister a couple of years ago and I'm excited to say we are finally picking up steam.

I was doing some research about something else, and I ran across some info online about conflicts of interest for nonprofits. I'm really worried that we have conflicts all over the place and we don't have any policies about them. We've just been grinding and trying to make everything work.

We weren't trying to do anything wrong. Here's what I'm worried about. My sister and I are both on the board and I also have some family, friends and former colleagues on my board.

There are five people, including me, and all of them have some kind of prior connection to me. Is that bad?

[Speaker 1]

Okay, I'm gonna stop you here because this person has like a big ass list.

[Speaker 2]

Yeah, we should say this up top.

[Speaker 1]

It's a big question. Let's just take each of their things just one at a time.

[Speaker 2]

Absolutely.

[Speaker 1]

So this first one, your sister and I are both on the board. You have some friends and family, former co-workers. That's fine.

That's fine. It's not like the best thing to have family members on the board, but it's not illegal. It depends on the situation, but it might not be recommended.

But it's not like terrible. Sometimes you're doing something because it affected your family and so it makes total sense that you have family members on the board. You just need to have more independent people around you so that if you and your family member are both conflicted out, then there are other people left to make a decision without you.

So that's kind of the family member thing. Friends and colleagues on the board.

[Speaker 2]

Hold on, I'm gonna pause you first. Why would it be a problem for a founder and their sister to be on the board? Like break down what the conflict is.

[Speaker 1]

Good question. I assume everybody knows this and they do not. So like why would it be a problem?

Let's just say I am starting a new nonprofit, and I would like to be the executive director. And because I love my spouse, my spouse is also on the board. When it comes time to vote for whether I should become the paid executive director of the organization, my spouse cannot participate in that discussion or that vote because my spouse and I have a financial interest in that happening.

So sometimes I will see really small new nonprofits where they only have like three people on the board or even like two depending on the state. If your state allows two, you could just have

you and your spouse. Well, if you have a conflict and there's nobody left, let's say there's one person.

It's you, your spouse, and one other person. Who's gonna vote?

[Speaker 2]

Yeah, there's no one to decide.

[Speaker 1]

Yeah, so it's not that it can't exist. It's just that like you could have a situation that would come up where you and your family member, because they are related to you, you both have a conflict of interest, and you can't participate in that board vote. And you can't sit there and talk about it or stare down everybody at the table while they talk about it either.

So you just need to have enough people left to actually make a decision.

[Speaker 2]

So like to break it down even further, the conflict, the problem that could arise in this situation is that if we're talking about paying one person and they're on the board and their family member would like materially benefit by that person getting paid, like they're in the same household, they will like make a profit off of that person getting paid. And a nonprofit is not supposed to be set up to like benefit all of its like not owners, you know, like you don't own the nonprofit. So it's important that the decision is not based off of I need money, the nonprofit can pay us money.

It's off of this is the best decision for the nonprofit.

[Speaker 1]

Yeah.

[Speaker 2]

And that's where those like conflicted loyalty comes in.

[Speaker 1]

Yeah. So if sister wants to be hired to do marketing and fundraising for the nonprofit, well, the other founder can't be involved in that situation because you're obviously your loyalty, you know, bloods thicker than water. The loyalty you have to your sister is probably going to be stronger than the loyalty you have to the nonprofit.

[Speaker 2]

Right. Right. Okay.

That breaks that down. Are we ready for her next worry?

[Speaker 1]

Yes.

[Speaker 2]

Or their next worry. Okay. So this founder also says one of our part time staffers used to rent an apartment from one of our board members.

They stopped living there before coming on staff with the nonprofit. Is that a conflict?

[Speaker 1]

Objection relevance. This has nothing to do with anything. I mean, this doesn't even impact the nonprofit.

So one of our part time staff used to their landlord is now on the board. This has nothing to do with anything. It's not a conflict of interest.

Just because people know each other or had some interaction in a previous life like does not mean it's a conflict of interest. There's no financial gain here. There's no harm.

There's no relation to even the nonprofit at all. So remember, the conflict of interest has to do with when our loyalty to the nonprofit might come into question. So this just has nothing to do with anything other than I hope this person was a good landlord because it would be really awkward to have a terrible slumlord as your boss now.

[Speaker 2]

I feel like when we hear from clients about conflicts, there's one of two kinds of people. Either they're super worried about every little thing or they don't care at all and are trying to pull off some kind of scammy stuff. And this person is clearly the first one where they're just like, I want to do everything right.

I don't really understand what a conflict is. So anytime money has ever exchanged hands, I'm going to worry about it. Yes.

And that is a totally normal thing that we hear about a lot. And I just wanted to say like, you know, they talk about being worried about having family, friends or former colleagues. They all have some connection to the founder.

And it's just like, it's totally normal that the people that are involved in the nonprofit are people that you know. Oh, my God.

[Speaker 1]

Yes. Very.

[Speaker 2]

You're not going to like have total strangers. Like, how are you going to do that?

[Speaker 1]

How would you be like, hi, I don't know you. You've never met me or have any reason to believe that I am doing anything important. But I'd like you to come over here and be a fiduciary.

Look, of course, everyone is going to know you in some capacity, even if it's just like you met them and they're great and you're inviting them on. That happens later. Usually that first group on the board is often people, you know, who have some connection to the thing that you're passionate about.

Yeah. A hundred percent. Like this person is way to the side of everything's a conflict.

Oh, my gosh. The sky is falling, which I will take all day long over somebody who doesn't care at all. So props to them for even thinking about it.

[Speaker 2]

Totally. Totally. OK, they have two more situations that they're concerned about.

So another one is my sister, who's on the board, is taking writing lessons at that same board member's farm, the one that was the landlord and pays for those lessons. This started years ago. But is it a problem now that they're both on the board again?

[Speaker 1]

No, this has nothing to do with anything. Who's this board member, though? They sound, I mean, interesting.

Yeah. Right. They got rental property.

They got horses and they teach. You know, I hope it's Western. They're down to earth if it's Western.

If it's English, you know, I'm starting to be like, hmm, I don't know. Then I have a problem with it. There's nothing here.

[Speaker 2]

Yep. Completely unrelated to the nonprofit.

[Speaker 1]

Yeah. I mean, just looking back at their facts, it doesn't really say what the nonprofit does, but they haven't said this relates in any way to their nonprofit program. It's not like this board member is also teaching writing lessons as part of the nonprofit mission, even if it was this other stuff is going on as a for profit activity, not related to the nonprofit, it sounds like.

So, again, like not relevant, not a conflict.

[Speaker 2]

All right. They've got one more. We hired a board member's daughter to help us build a website.

She's a web designer. She did it for super cheap, but we did pay her for her work.

[Speaker 1]

Ding, ding, ding. Where's the sound effects for like, it's a conflict. We need a pew, pew, pew, pew.

This is a conflict. OK, we've got one. All right.

Let's break it down. We hired a board member's daughter. So that means that board member, when you guys were sitting around at the board meeting saying, oh, my gosh, we need a website.

What are we going to do? And somebody said, hey, isn't your daughter a web designer? Maybe she could do it for us.

That is the moment where you say, I can be happy to make that introduction. And then after that point, you don't board member doesn't talk about this at the board meetings because they have a conflict. Their child is going to have a financial benefit by getting paid to design the website for the nonprofit.

So that's fine. But it is a conflict of interest. So what they said was she did it for super cheap.

So how do we know that? Right. I mean, we might just like objectively know that because they did it for four hundred dollars.

OK, that's very cheap. Anybody that knows anything about building a website knows four hundred bucks would be cheap. But maybe it's just like we think it's cheap.

Well, the best thing to do here would be to get like three quotes, find out what market rates are for building the website that you want. So you have an apples to apples comparison and then get that board member out of the room. Talk about it.

Talk about the three quotes. Talk about what you need. Talk about the daughter's rate and how it's less than market rate and then vote and decide, yeah, we want to pay this person.

It's very reasonable. We're going to do this. And then after you've had the vote, you can invite that board member who has a conflict back into the room and then it's handled.

So what I see happening with these kinds of situations where it's yes, this is a conflict and then the worrywart types go, oh, we can't hire them.

[Speaker 2]

Yeah, we can't do it.

[Speaker 1]

Can't do it. It's a conflict of interest. Well, no, you can, but it needs to be managed appropriately.

You need to show that it was an arm's length transaction, that you didn't pay over fair market value, and you need to have the board member who has the conflict not participate in the discussion or the vote. And then it's all gravy.

[Speaker 2]

Yeah. So it would be a problem if say, you know, board member's daughter is not actually a web designer and just wants to dabble a little bit, has never done this before, is going to charge over fair market rates. And this is just a way to get this board member's daughter paid because she's unemployed.

And this is really just a kind of like messy way to get her a job.

[Speaker 1]

Yep. That would be bad.

[Speaker 2]

Yeah. That's the kind of like, unethical decision making we're trying to avoid by recognizing and managing our conflicts.

[Speaker 1]

Yeah. And the other thing is, hey, if you're listening to this and you're like, oh my God, we already did this, and we didn't do it right. Okay.

It's not the end of the world. I mean, you should have done this right the first time, but you can go back, and you can get three quotes for, you know, a website that looks like this and just verify what the market rate was. You can be like, oh, we realized we had a conflict.

Oh, we realized we shouldn't have done it that way, but we've verified that we, you know, dealt with her in an arm's length transaction and we didn't overpay. And now we will adopt a conflict of interest policy and follow it going forward. That's fine.

Like people make mistakes. It's not the end of the world. You don't have to like freak out.

People aren't coming to arrest you tomorrow. Just like correct what was wrong and like do better going forward. You're going to be okay.

[Speaker 2]

Yeah. So you mentioned a conflicts of interest policy. Tell us a little bit about that.

Like, what does it say? What should you have in your policy?

[Speaker 1]

I knew you were going to ask something like this when I heard this episode was about conflicts. And I thought, gee, I should pull up our policy documents so I can tell what's in it because Meghan's going to freaking ask me. And did you just?

I didn't because I am a lazy SOB. You're not lazy. You're busy.

It's true. Okay. So the conflicts policy that like meets IRS standards and industry best practices is going to basically, the rundown is like this.

It's like, what is a conflict? It's going to define what conflicts are. Not in like individual cases, but like this is when a conflict is happening.

When you have a financial conflict, it looks like this. If you have a fiduciary conflict, it looks like that. Okay.

Then it's going to be like, what do we do when this happens? Here's the procedure for what we do. A, we determine there's a conflict.

B, we decide if we can do anything about it. C, we, you know, blah, blah, blah, blah, blah. And then sometimes there's like a section for what happens if there's a violation of the policy?

What corrective actions do we take or something like that? So it's pretty basic. It's not very detailed other than really explaining what conflicts are.

And I think that's because people don't actually understand what conflicts are. So the best thing of having a policy is actually being able to go to it and decide whether this is a conflict. Because for people who are concerned, you're going to have like all these things that are keeping you up at night worrying.

And if you had your policy in front of you, you could read through it and be like, oh, this is no big deal. This doesn't have anything to do with anything. We're fine.

And then you can sleep.

[Speaker 2]

And when you are in a place that is in direct communicators and the word conflict feels evil, it is a lot easier to point to a policy. If someone has a conflict and it's not being recognized, you're no longer the bad guy.

[Speaker 1]

It's not me saying you can't vote on your kid's website design payment.

[Speaker 2]

It's the policy. Remember you signed that when you came out to the board or whatever.

[Speaker 1]

Oh, you brought up signing it. That's the other thing is you're supposed to have an annual disclosure every year where each director and officer signs a paper that says I have received the policy. I understand the policy.

And oh, by the way, here is a list of things that I potentially could have conflicts around. And if there's anything that could be relevant to your board service that might come up someday, like say this is a horse rescue and our board member who is a landlord and teaches riding lessons may someday house animals for us. Well, better put down that you have a boarding facility that deals with horses, which would be totally logical that somebody in the horse space would be on a board that rescues horses.

Again, these things are not bad. It's just we need to manage them and decide what to do proactively.

[Speaker 2]

Exactly, exactly. And we have a great policy and disclosure form for you in our toolkit. Sure do.

[Speaker 1]

She must plug Mission Guardian.

[Speaker 2]

Yeah, go look at the link. It'll be in there for you. OK, so I feel like we kind of addressed all parts of this question.

So are we ready for just some takeaways here? Yeah. All right.

So I got a couple of things for you. First, conflicts are not inherently bad, but cannot be ignored and need to be dealt with proactively. And you do that by adopting a conflicts policy and having your board members and key staff go through an annual disclosure process.

See toolkit. Plug again.

[Speaker 1]

It's so cheap. Just get it. It's so cheap.

It's got all the things you need. Come on.

[Speaker 2]

Yeah. Secondly, if you have a conflict, there are ways that you can manage that conflict. Usually it looks like removing yourself or recusing yourself from the board vote on a decision.

So it does not mean that you can't go forward with an action that would give you a conflict of interest. It just means that you can't be involved in the decision making process.

[Speaker 1]

Yep.

[Speaker 2]

So do your due diligence. Make sure it truly is the right decision for the nonprofit and not because it's your daughter or your spouse or your child or whatever. But that hiring this person or making this decision is the best for the nonprofit.

And the last one is just that like, take a deep breath. Conflicts are not terrifying. It's OK.

I appreciate being worried about them because it is one of those things that it feels like can be everywhere if you're not sure what they are. But it's totally OK to have these worries about conflicts and it's going to be OK.

[Speaker 1]

Yeah.

[Speaker 2]

The fact that you're worried means that you care, which is a good sign.

[Speaker 1]

Absolutely. I want to throw in one pro tip.

[Speaker 2]

Yes.

[Speaker 1]

Before we end. So sometimes conflicts are really awkward because people don't know when to speak up and be like, oh, I needed to tell you that actually that my kid works there. And it can, especially in a place like Minnesota where people are not very direct or forward, it can be just odd.

And when conflicts don't come up very much, there can like be this baked in shame, like, oh, my God, it's a conflict. So what I would recommend as a pro tip is like at the top of every board meeting, just say, having reviewed the agenda, does anyone have any conflicts regarding this agenda that you'd like to let us know about right now? And that normalizes conflicts as just a thing that can come up from time to time that can be dealt with.

And it gives people who might be wondering, like, when do I bring this up? A way to say, oh, yeah, actually on item number seven, I have a conflict potentially there. And then now we can talk about it.

Now we can see how our policy applies. We can determine if a conflict exists. So that's just like my pro tip.

I just want to throw in there.

[Speaker 2]

I love that. It takes some of the like loadedness out of it. And it's just a routine part of being a board member, which should be so.

[Speaker 1]

Yeah. Well, that was great. And I feel like this was really meaty and valuable because it's like one of the top areas that we get questions about all the time.

So, folks, if you thought this was valuable, you should share it with a friend. You should rate this podcast, subscribe, like, tell other people about it. It really will help us out.

If you have a question or a story to share, I'd love to hear from you. Send me a note online at charitytherapy.show. And thanks for listening.

About the Author



Hi, I'm Jess Birken.

I'm the owner of Birken Law Office, I help nonprofits solve problems so they can quit worrying and get back to what matters most – The Mission. I'm not like most attorneys, I actually have an outgoing personality, and – like you – I like to think outside the box. Most of my clients are passionate and have an entrepreneurial spirit. I'm like that too. My goal is to help you crush it. Getting bogged down in the minutia sucks the joy out of the important stuff. My clients want to do the work – not the paperwork.

Let's connect!

jess@birkenlaw.com | [612.200.3679](tel:612.200.3679) | [@JessBirken](https://www.linkedin.com/in/jessbirken)
www.linkedin.com/in/jessbirken
www.facebook.com/birkenlaw