

**LIBRARY  
GOVERNANCE:  
NEW YORK'S LEGAL  
FRAMEWORK**

Conrad R. Wolan, Esq.  
Sayles & Evans  
Elmira, NY

# Today's Goals

- Law School 101: The origins and hierarchy of “The Law.”
- A quick review of the laws that govern libraries in New York State (and why it's more complicated than you think).
- The fiduciary duty.
- The Nonprofit Revitalization Act.

# Sources of Law

## (Law School 101)

- Constitution of the United States
  - Congress
  - President
  - Supreme Court

# Sources of Law

## (Law School 101)

- Constitution of the United States
  - Congress . . . **creates the law.**
- President
- Supreme Court

# Sources of Law

## (Law School 101)

- Constitution of the United States
  - Congress . . . creates the law.
  - President . . . **executes** the law.
    - Through departments, agencies, bureaus, boards
  - Supreme Court

# Sources of Law

## (Law School 101)

- Constitution of the United States
  - Congress . . . creates the law.
  - President . . . executes the law.
    - Through departments, agencies, bureaus, boards
  - Supreme Court . . . **resolves disputes** by applying the law.

# Sources of Law

## (Law School 101)

### ➤ Statutes

- The “laws” enacted by Congress

### ➤ Regulations

- The “laws” adopted by agencies
  - The “Fourth Branch”

### ➤ Judicial Decisions

- The “laws” made by courts/judges
  - Resolving actual controversies
  - Interpreting statutes/regulations
  - Interpreting the Common Law

# Sources of Law

## (Law School 101)

- Quasi-Judicial Decisions
  - The “laws” made by administrative law judges (ALJs)
    - Function like courts, but with limited scope/effect
- Administrative Guidance
  - Not “laws”
  - But helpful guides to interpretation
    - FAQs
    - Opinion letters
    - “Dear Colleague” letters

# Sources of Law

## (Law School 101)

- Federal (United States)
  - Constitution
  - Statutes
  - Regulations
  - Judicial Decisions
  - Quasi-Judicial Decisions
  - Administrative Guidance
- State (New York)
  - Constitution
  - Statutes
  - Regulations
  - Judicial Decisions
  - Quasi-Judicial Decisions
  - Administrative Guidance

# Sources of Library Law

- Libraries are First Governed by the NYS Education Law
  - “By a majority vote at any election ... any county, city, village, town, school district or other body authorized to levy and collect taxes ... may individually or jointly authorize the establishment of a public library with or without branches, and may appropriate money raised by tax or otherwise to equip and maintain such library or libraries or to provide a building or rooms for its or their use.” Section 255(1)

# Sources of Library Law

- There are Two Classes of Library
  - **Public libraries** are defined as: “a library, other than professional, technical or public school library, established for free public purposes by official action of a municipality or district or the legislature, where the whole interests belong to the public.” Ed. Law § 253(2).
  - **Association libraries** are defined as: “a library established and controlled, in whole or in part, by a group of private individuals operating as an association, close corporation or as trustees under the provisions of a will or deed of trust.” Ed. Law § 253(2).

# Sources of Library Law

- Libraries are also Governed by the NYS Not-for-Profit Corporation Law
- The Board of Regents has authority to incorporate educational institutions such as libraries by issuing a charter or certificate of incorporation. Ed. Law § 216.
- Libraries chartered under Section 255 of the Education Law are considered an “education corporation” and are subject to the Not-for-Profit Corporation Law. Ed. Law § 216-a.

# Sources of Library Law

- Libraries are also Governed by Other Sources of New York Law
  - Other **Statutes** (some examples)
    - General Municipal Law
    - General Construction Law
    - Public Officers Law
  - **Regulations** (some examples)
    - State Education Department
    - Office of the State Comptroller
  - **Judicial Decisions**
  - Some **“Non-Law” Sources** Can Be Influential (some examples)
    - Opinions of the State Comptroller
    - Opinions of the Committee On Open Government

# Trustee Obligations

## (The Big Picture)

### ➤ The Moral Standard

- “A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.” *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928).

### ➤ The Skill Standard

- Directors and officers must discharge their duties “in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.” N-PCL § 717(a).

# **Trustee Obligations**

## **(The Big Picture)**

- Duty of Care
- Duty of Obedience
- Duty of Loyalty

# Nonprofit Revitalization Act

- Revised the Not-for-Profit Corporation Law
  - Effective on July 1, 2014, with certain exceptions.
  - This is the first major revision to the law in over 40 years.
- Major details:
  - *Requirements triggering an independent audit*
  - *Independent audit oversight*
  - **Internal policies**
  - **Related party transactions**
  - **Independent directors**

# Nonprofit Revitalization Act

## ➤ Reviews and Independent Audits

- These requirements generally **do not** apply to libraries.
  - Entities that file annual reports with the Office of the Attorney General must comply.
  - Entities that file annual reports with SED are not covered.

# Nonprofit Revitalization Act

## ➤ Internal Policies

➤ Boards must adopt, or update, two key policies:

### ➤ **Conflicts of Interest Policy**

➤ All entities must adopt a conflicts of interest policy applicable to directors, officers, and key employees.

### ➤ **Whistleblower Policy**

➤ Entities with over \$1,000,000 in annual revenue and 20 or more employees must adopt a whistleblower policy to protect from retaliation persons who report suspected improper conduct.

# Nonprofit Revitalization Act

## ➤ Internal Policies

### ➤ **Conflicts of Interest Policy**

- Defines a conflict of interest;
- Provides procedures for disclosing a conflict of interest;
- Requires that the person with the conflict of interest not be present at or participate in committee or board deliberation;
- Requires that the person with the conflict of interest not vote on the matter giving rise to the conflict;
- Prohibits any attempt by the person with the conflict to influence the deliberation or voting;
- Requires that the existence and resolution of the conflict be documented; and
- Provides procedures for disclosing, addressing, and documenting related party transactions.

# Nonprofit Revitalization Act

## ➤ Internal Policies

### ➤ **Whistleblower Policy**

- Provides procedures for the reporting of violations or suspected violations of law or policy (including procedures for preserving the confidentiality of reported information);
- Requires that an employee, officer, or director of the entity be designated to administer the whistleblower policy and to report to the audit committee; and
- Requires that a copy of the policy be distributed to all directors, officers, and employees, and to volunteers who provide substantial services to the entity.

# Nonprofit Revitalization Act

## ➤ Related Party Transactions

### ➤ “**Related party**” is defined as

- (i) any **director, officer or key employee** of the corporation;
- (ii) any **relative** of any director, officer or key employee of the corporation;
- (iii) any **corporation** in which any individual described in clauses (i) and (ii) has a **35% or greater ownership** or beneficial interest **OR**, in the case of a partnership or professional corporation, a direct or indirect **ownership interest in excess of 5%**.

### ➤ Actions required before entering into a related-party transaction:

- Board must **determine** that transaction is fair, reasonable, and in the entity’s best interest.
- Directors must **disclose** to the board the material facts concerning any interest in a related party transaction.
- When the related party has a **substantial financial interest**, the board must also:
  - Consider **alternative transactions** to the extent available;
  - Approve the transaction by not less than a **majority vote**; and
  - Contemporaneously **document** in writing the basis for the board’s approval, including its consideration of any alternative transactions.

# Nonprofit Revitalization Act

## ➤ Do you need an Audit Committee?

➤ No.

➤ But . . . certain functions must be overseen by **independent directors.**

➤ What functions?

➤ The adoption, implementation of, and compliance with **any** Conflict of Interest Policy or Whistleblower Policy adopted by the corporation.

➤ You can use the Board . . . but not really.

➤ You can use another committee . . . maybe.

# Nonprofit Revitalization Act

- Independent Directors
- The audit committee must be composed of “independent directors.”
- An “independent director”:
  - is not, and has not been within the last 3 years, an employee of the corporation, and does not have a relative who is, or has been within the last 3 years, a key employee of the corporation;
  - has not received, and does not have a relative who has received, in any of the last 3 fiscal years, more than \$10,000 in direct compensation from the corporation (other than reimbursement for expenses reasonably incurred as a director or reasonable compensation for service as a director); and
  - is not a current employee of or does not have a substantial financial interest in, and does not have a relative who is a current officer of or has a substantial financial interest in, any entity that has made payments to, or received payments from, the corporation for property or services in an amount which, in any of the last 3 fiscal years, exceeds the lesser of \$25,000 or two percent of such entity's consolidated gross revenues. For purposes of this definition, “payment” does not include charitable contributions.

# Nonprofit Revitalization Act

- Independent directors
- The audit committee must be composed of “independent directors.”
- An “independent director”:
  - is not, and has not been within the last 3 years, an employee of the corporation, and does not have a relative who is, or has been within the last 3 years, a key employee of the corporation;
  - has not received, and does not have a relative who has received, in any of the last 3 fiscal years, more than \$10,000 in direct compensation from the corporation (other than reimbursement for expenses reasonably incurred as a director or reasonable compensation for service as a director);
  - is not a current employee of or does not have a substantial financial interest in, and does not have a relative who is a current officer of or has a substantial financial interest in, any entity that has made payments to, or received payments from, the corporation for property or services in an amount which, in any of the last 3 fiscal years, exceeds the lesser of \$25,000 or two percent of such entity's consolidated gross revenues. For purposes of this definition, “payment” does not include charitable contributions.

# Nonprofit Revitalization Act

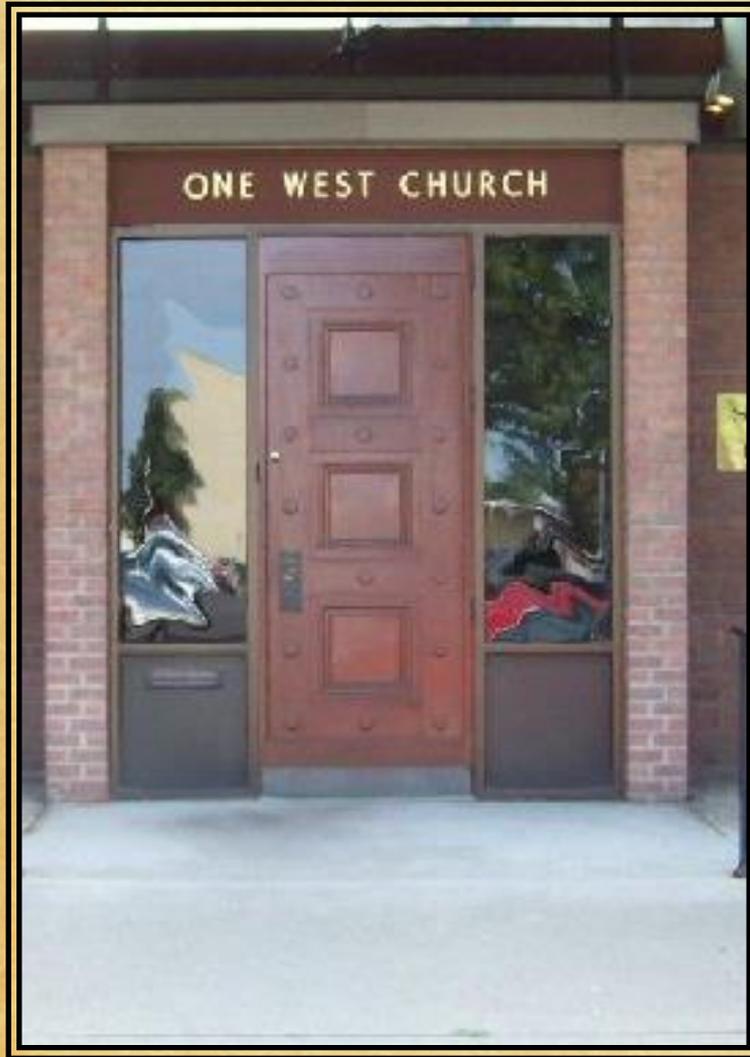
- Independent directors
- The audit committee must be composed of “independent directors.”
- An “independent director”:
  - is not, and has not been within the last 3 years, an employee of the corporation, and does not have a relative who is, or has been within the last 3 years, a key employee of the corporation;
  - (has not received, and does not have a relative who has received, in any of the last 3 fiscal years, more than \$10,000 in direct compensation from the corporation (other than reimbursement for expenses reasonably incurred as a director or reasonable compensation for service as a director));
  - is not a current employee of or does not have a substantial financial interest in, and does not have a relative who is a current officer of or has a substantial financial interest in, any entity that has made payments to, or received payments from, the corporation for property or services in an amount which, in any of the last 3 fiscal years, exceeds the lesser of \$25,000 or two percent of such entity's consolidated gross revenues. For purposes of this definition, “payment” does not include charitable contributions.

# Nonprofit Revitalization Act

- Independent directors
- The audit committee must be composed of “independent directors.”
- An “independent director”:
  - is not, and has not been within the last 3 years, an employee of the corporation, and does not have a relative who is, or has been within the last 3 years, a key employee of the corporation;
  - (has not received, and does not have a relative who has received, in any of the last 3 fiscal years, more than \$10,000 in direct compensation from the corporation (other than reimbursement for expenses reasonably incurred as a director or reasonable compensation for service as a director));
  - is not a current employee of or does not have a substantial financial interest in, and does not have a relative who is a current officer of or has a substantial financial interest in, any entity that has made payments to, or received payments from, the corporation for property or services in an amount which, in any of the last 3 fiscal years, exceeds the lesser of \$25,000 or two percent of such entity's consolidated gross revenues. For purposes of this definition, “payment” does not include charitable contributions.

# What Does It All Mean?

- “The Law” is actually a synthesis of many different contributions.
- “It depends” is the right answer to most legal questions.
- A trustee’s fiduciary duty requires working toward the best interests of the entity.
- The Nonprofit Revitalization Act provides mechanisms to emphasize one’s fiduciary duty.



## **Conrad R. Wolan, Esq.**

Sayles & Evans

One West Church Street

Elmira NY 14901

607-734-2271

[cwolan@saylesevans.com](mailto:cwolan@saylesevans.com)

Special Thanks to  
Emily A. Crabtree, Esq.