

# West Texas Rural Philanthropy Days

July 31-August 2, 2019

LEGAL ASPECTS OF FUNDRAISING

A DEEPER PERSPECTIVE

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# Not legal advice

- ▶ Information set forth in this presentation is not offered as, and should not be considered legal advice. This information is set forth solely for purposes of discussion and to guide the listener/reader in thinking through circumstances and issues as they may develop. It is advised to consult with a legal advisor about the particular facts of any situation.

# A Deeper Perspective

- ▶ What's “deeper” about this perspective?
  - ▶ Focus on big picture and not just success of the fundraising effort
  - ▶ Focus on responsibility over dollars raised
  - ▶ Focus on perceptions
    - ▶ Who cares and why?
      - ▶ The organization and its officers and directors
        - ▶ Fiduciary Duties
        - ▶ Legal Liability
        - ▶ It matters what “others” think!

# A Deeper Perspective

- ▶ Who are the “others”?
  - ▶ The Giving Public (Donors)
  - ▶ The Media
  - ▶ Watchdog Organizations
  - ▶ Potential Board Members
- ▶ Focus on Compliance with the Law

# Overview

- ▶ What Will We Discuss?
  - ▶ Laws impact your fundraising practices.
  - ▶ Laws of which you should be aware.
  - ▶ What you should know before you solicit.
  - ▶ What happens if you solicit across state lines.
  - ▶ Restricted Funds: capital campaigns and specific projects
  - ▶ Representations = Promises
  - ▶ Borrowing from restricted funds. Ok?

# Overview

- ▶ More Specifically What We'll Discuss
  - ▶ The Basics of Formation/Mission
  - ▶ Registration Laws
  - ▶ Deceptive Trade Practices Act
  - ▶ Fraud Law

# Overview

- ▶ Restrictions and How/When to Remove Them
  - ▶ Equitable Deviation
  - ▶ *Cy Pres*
  - ▶ Texas Uniform Prudent Management of Institutional Funds Act (TUPMIFA)
  - ▶ Trust Code

# Don't Get your Hopes Up

- ▶ What we will NOT discuss
  - ▶ The Rules and Laws Applicable to Fundraising Events
    - ▶ Raffles and Bingo, Prizes and Sweepstakes
  - ▶ Identifying and Wooing Donors
  - ▶ Solicitors and Fundraising Professionals
  - ▶ Creative New Ideas on Fundraising
    - ▶ Social Media
    - ▶ Bit Coins
  - ▶ Federal and State Taxes and your Fundraising Costs



# Mission and Fundraising go hand in hand

- ▶ The Basics-Let's Start at the Very Beginning—
  - ▶ Mission, Mission, Mission and its relationship to fundraising
  - ▶ Obtaining and Maintaining Nonprofit, Charitable Status
    - ▶ Section 501(c)(3) status (Federal Law)
      - ▶ 1023 and its representations
      - ▶ 990 annual return and its representations
  - ▶ Nonprofit Incorporation (State Law)
    - ▶ Certificate of Formation and its representations

# Whose money is this?

## ▶ **It's the Public's Money**

- ▶ Nonprofit organizations hold public funds as stewards
- ▶ Funds raised belong to the public.
- ▶ There is no “mine” in the world of nonprofit, charitable organizations.
  - ▶ Take “it's my baby” out of your vocabulary.
  - ▶ There are no real secrets
  - ▶ Know that you are bettering the world we live in!

# Solicitation and the Laws that Apply

- ▶ Solicitations and Fundraising--What Laws Apply
  - ▶ Registration Laws (State law):
    - ▶ TEXAS
      - ▶ **Public Safety Organizations** TEX. OCC. CODE SEC. 1803
        - ▶ Both the organization and its outside solicitor must register with the Secretary of State and pay a fee.
        - ▶ Solicitor must post a bond.

# Solicitation and the Laws that Apply

- ▶ **Veterans Organizations** TEX. OCC. CODE SEC. 1804
  - ▶ Both the organization and its outside solicitor must register with the Secretary of State and pay a fee.
  - ▶ Solicitor must post a bond.
  - ▶ Strict requirements surround whether the organization can use a solicitor based on membership composition of the organizations. (90% veterans)

# Solicitation and the Laws that Apply

- ▶ The Texas **Law Enforcement Telephone Solicitation Act**
  - ▶ <https://statutes.capitol.texas.gov/Docs/BC/htm/BC.303.htm>
  - ▶ Applies to certain law enforcement related organizations who solicit by telephone in TX
  - ▶ Both the organization and its outside solicitor must register with the Attorney General and pay a fee
  - ▶ Solicitor must post a bond with the Secretary of State

# Solicitation and the Laws that Apply

- ▶ Other States' laws apply if you solicit in those states
  - ▶ Charleston Principles—Timeless guidance
    - ▶ <https://www.nasconet.org/resources/>
    - ▶ Originated in 1999, revisited in 2017 –no change.
    - ▶ Not “law” but excellent guidance.
    - ▶ NASCO
    - ▶ <http://www.nasconet.org/wp-content/uploads/2018/04/Charleston-Principles.pdf>

# Solicitation and the Laws that Apply

- ▶ With the internet came “unintended” solicitation across state lines
  - ▶ Intent is irrelevant—you need only accept the donation
- ▶ DONATE button= registration
  - ▶ Two-way communication
  - ▶ Accept the donation = doing business
  - ▶ May be other ways you trigger registration-examine the reach
- ▶ 40 other states and DC require registration
  - ▶ Laws are all different!
  - ▶ It gets expensive!

# Solicitation and the Laws that Apply

- ▶ The Single Portal Initiative-Will it Save the Day?
  - ▶ State Charity Registration Portal is online system
  - ▶ Allows charitable nonprofit organizations and their professional fundraisers to comply with all state's registration and annual filing requirements in a single place.  
<http://www.statecharityregistration.org/>
  - ▶ States must sign on—slowly but surely (we hope)
  - ▶ Complicated process—Technology to the rescue!



# Deceptive Representations

- ▶ The Texas Deceptive Trade Practices Act
  - ▶ TEX.CIV.PRAC.& REM. CODE, SEC. 17.60 ET SEQ.
  - ▶ Fraudulent Solicitations
  - ▶ Civil Penalties
  - ▶ Must be False, Misleading or Deceptive
  - ▶ Enforceable by the public and the AG
  - ▶ Civil Investigative Demand issuance by AG/Statement under oath

# More Fraud Trouble

- ▶ Fraud at common law (Common law is REAL law by judicial decision!)
  - ▶ Reliance on false statements knowingly made
  - ▶ Statement made for the purpose of inducing action
  - ▶ Ignorant of Falsity
  - ▶ Injury
  - ▶ Enforceable by injured party or Attorney General

# Texas Business Organizations Code

- ▶ Texas Business Organizations Code: Chapter 22
  - ▶ Chapter 22 applies to nonprofit corporations
  - ▶ TEX. BUS. ORG. CODE, Section 22.351-353
    - ▶ Financial Records must be maintained and produced
      - ▶ To members
      - ▶ To general public

# Texas Business Organizations Code

- ▶ Chapter 12 of Texas Business Organizations Code: Attorney General
  - ▶ Authorizes Attorney General
    - ▶ Right to inspect and copy any “record”
      - ▶ Not limited to financial records
      - ▶ TEX. BUS. ORG. CODE, Sections 12.151, 12.152
  - ▶ Right to investigate the organization, conduct and management for violations of
    - ▶ any law of the state
    - ▶ the organization’s governing documents (mission!)

# Texas Business Organizations Code

- ▶ Attorney General Oversight Generally
  - ▶ The authority is broad
  - ▶ Misrepresentation is the easiest enforcement action to take
  - ▶ Restricted Funds are a priority focus
- ▶ Best Practices always
  - ▶ Maintain minutes reflecting duties are met
  - ▶ Financial checks and balances are a must
  - ▶ Separately account for restricted funds

# TBOC—Duties of Officers & Directors

## Breach of Fiduciary Duty

22

- ▶ Texas Business Organizations Code: Duties of Officers and Directors
  - ▶ Adopted from Common Law: Care, Loyalty and Obedience
  - ▶ Duties of **Directors**, Section 22. 221, Must
    - ▶ Must discharge duties
      - ▶ In good faith
      - ▶ With ordinary care
        - ▶ Compared to “ordinary” person in same or similar circumstance
        - ▶ Experts (accountants and attorneys) are compared to their kind
    - ▶ In a manner the director reasonably believes to be in the best interest of the corporation

# TBOC—Duties of Directors

- ▶ How should Directors comply with ordinary care?
  - ▶ Be reasonably informed in support of decision making
  - ▶ Know purpose and make decisions “in light of” that purpose
  - ▶ Be advised of management's responsibilities
  - ▶ The BOC says that Directors are responsible for the management of the organization
    - “...the affairs of a corporation are managed by a board of directors.” TEX. BUS. ORG. CODE, Section 22.201

# TBOC—Duties of Officers

- ▶ Duties of **Officers**, Section 22. 235
  - ▶ Must discharge duties
    - ▶ In good faith
    - ▶ With ordinary care
      - ▶ Compared to “ordinary” person in same or similar circumstance
      - ▶ Experts (accountants and attorneys) are compared to their kind
  - ▶ In a manner the officer reasonably believes to be in the best interest of the corporation



# TBOC – Loyalty and Obedience

- ▶ Duties of Loyalty and Obedience
  - ▶ Common law reflected in statutory standards of “good faith” and “best interest of organization”
  - ▶ Interests of your organization come before self-interest
  - ▶ Don't steal opportunity for self-gain
  - ▶ Be obedient to Mission!

# Summary of Duties

▶ What would your mother say?

# Restricted Gifts

- ▶ Restricted Gifts
  - ▶ Reminder! It isn't "your" money.
  - ▶ Gifts raised for a restricted purpose cannot be spent on general mission
- ▶ Did I promise that?
  - ▶ Fundraising literature and other donor appeals
  - ▶ Advertisements/Fundraising events
  - ▶ Development officers "pitch"

# Restricted Gifts

- ▶ Restricted Gifts are “trusts”
  - ▶ Donor surrenders rights
  - ▶ Organization may not return gifts
    - ▶ Exception: Retained reversionary interest
  - ▶ Organization must separately account
  - ▶ **Funds can't be used for general mission (worth repeating)**
  - ▶ Don't borrow from designated funds!!!
    - ▶ Liability of Directors and Officers is real and easily identified.

# Restricted Gifts

- ▶ What if my Organization Can't Keep its Promise?
  - ▶ Case in point: Failed capital campaign to build an art center
    - ▶ No take backs unless donor retained reversionary right
  - ▶ Consider "alternative" use as part of solicitation
  - ▶ Consider court proceeding to modify
    - ▶ Texas Uniform Prudent Management of Institutional Funds Act.
      - ▶ TEX. PROP. CODE Chapter 163
  - ▶ Texas Attorney General must receive notice
    - ▶ TEX. PROP. CODE Chapter 123

# TUPMIFA

- ▶ Texas Uniform Prudent Management of Institutional Funds Act (TUPMIFA)
  - ▶ Institutional Funds
  - ▶ Cy Pres and Equitable Deviation
  - ▶ Similar Purpose
  - ▶ Court proceeding unless:
    - ▶ Donor consents
    - ▶ Small and Old Fund

# Whose interests do the laws protect?

- ▶ Donors
  - ▶ Assure donor's gift goes as directed
  - ▶ Protect donors from fraud
  - ▶ Protect donor's privacy
- ▶ Charities
  - ▶ Assure it receives contributions intended for its mission
  - ▶ Assure funds used for charitable purposes/Weed out the bad actors
  - ▶ Charitable sector
    - ▶ Faith in the nonpublic sector
    - ▶ Public's interest in charity

# Do Solicitation Laws Work?

- ▶ Bad Actors don't register.
- ▶ Statutes may not give regulators sufficient remedies
- ▶ Helps to know someone is looking over your shoulder
- ▶ Face to the Public: Registration Statement and accompanying filings
- ▶ Gaining Public Trust



# First Amendment Issues: Solicitation is Protected Speech

- ▶ Commercial Solicitation is considered protected speech
  - ▶ Intertwined with educational and persuasive speech that explains mission
  - ▶ Does high bar of Fraud help the sector?

# Keep your promises and REPORT

- ▶ Be honest
- ▶ Be transparent
- ▶ Be CAREFUL
- ▶ Be proud!

# Thank you and be careful out there!

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